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No. 401
DEC 4

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

MALCOLM DONALD,
EDWARD E. ELDER,
HERRICK, SMITH, DONALD & FARLEY,
Boston, Massachusetts.

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In The

Supreme Court of the United States

OCTOBER TERM, 1935

No. 401.

UNITED STATES OF AMERICA
Petitioner,

v.

WILLIAM M. BUTLER et al.,
Receivers of Hoosac Mills Corporation,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file this brief as *amicus curiae* in the above entitled suit.

Your petitioner asks to file said brief on behalf of the National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States, comprising some of the largest mills in the country.

The members of this Association process cotton in conducting their business, and against practically all of them the United States has asserted the right to collect

processing taxes under the provisions of the Agricultural Adjustment Act. They are, therefore, vitally interested in a decision of the Constitutional questions presented in the above-entitled suit.

The Solicitor General of the United States and counsel for the Respondents have assented to the filing of this brief and their written assents are filed herewith.

MALCOLM DONALD

On Behalf of
National Association of Cotton Manufacturers.

Boston, Massachusetts,
November 30, 1935.

No. 401.

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

This brief is filed by Malcolm Donald as Amicus Curiae on behalf of The National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States.

I.

PRELIMINARY MATTERS.

A. BRIEF STATEMENT OF THE CASE.

This case arose in connection with the receivership proceedings of Hoosac Mills Corporation. The United States filed in said proceedings a claim for certain processing and floor stock taxes, totaling $81,694.28, levied under the Agricultural Adjustment Act for cotton processed in the period, August 1, 1933 to October 7, 1933.

The receivers reported that the claims for these taxes should be disallowed. The District Court for the District of Massachusetts held the taxes valid. On appeal, the Circuit Court of Appeals for the First Circuit reversed the District Court on the grounds that the Act unlawfully delegated legislative power to the Secretary of Agriculture and because the legislation invaded the rights of the states.

B. ISSUES DISCUSSED IN THIS BRIEF.

The issues discussed in this brief are as follows:

First: Can Congress, by reason of its right to levy taxes to provide for the "general welfare of the United States" impose taxes to be paid to cotton growers who conform to its plan to restrict the production of cotton, and by this means regulate the production of cotton?

Second: Can Congress so regulate the production of cotton in order to carry out its fiscal policies?

Third: Do taxes so imposed on cotton manufacturers, to be paid cotton growers who reduce their production for the purpose of enabling cotton growers to obtain higher prices for their product, and thereby, and by reason of the payments so made them, receive a fair share

of the national income, violate the due process of law clause of the Fifth Amendment?

C. IMPORTANCE OF THE QUESTIONS.

It is hardly necessary to point out the importance of these questions.

1. As respects the cotton textile industry of the country the case involves the question of whether the United States can lawfully impose an excise tax upon cotton mills for the purpose of making payments to cotton growers, for the express purpose of inducing cotton growers to reduce the amount of cotton grown in order to increase the price of this raw material which the mills must purchase.*

2. The case involves another question of still more far reaching importance. If this legislation is held constitutional, the United States by offering benefits to those who accede to its plans can accomplish the control over the internal affairs of the states which was denied it in

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*NOTE. The cotton textile industry must pay taxes amounting to approximately $116,000,000 annually (Agricultural Adjustment Report, 1933-1934, p. 29) for the purpose of taking out of production a substantial percentage of the cotton acreage of the country and for the express purpose of increasing the price of cotton—the principal raw material used by the mills—approximately an equal amount. As the total value of the goods produced in 1933 by the cotton textile industry was $861,170,352, the processing taxes alone amount to 13.4% of that value. The price of cotton has risen from 6 cents to 12 cents since the legislation was enacted. (See U. S. Census Report, 1933: Census for Manufacturers, Cotton Goods.) If the portion of this increased cost resulting from the reduction program of cotton used by the mills be estimated at the rate of 3 cents per pound on the amount of cotton estimated by the Secretary of Agriculture to be used by the mills—5,523,809 bales—there is an added cost of $82,857,000 annually imposed on the mills or 9.5% of the value of goods produced in 1933, making a total added cost of approximately 23%.

The processing taxes paid by 206 companies spinning and weaving cotton in the period January 1 to June 30, 1934 were 40% of the wages paid in that period (Federal Trade Commission, The Textile Report, Part II, p. 18).

Schechter v. *United States* (55 Sup. Ct. Rep. 837) and in the long line of cases, the principal of which was reaffirmed in the *Schechter* case. If the United States has power so to control the internal affairs of the states this will destroy the "authority of the States over matters purely local" which is "essential to the preservation of our institutions" (*Hammer* v. *Dagenhart,* 247 U. S. 251, 275).

D. SUMMARY OF OUR ARGUMENT.

Our contentions are, briefly, as follows:

THE PROCESSING TAXES ARE AN INTEGRAL PART OF THE SCHEME TO RESTRICT PRODUCTION.

1. The Agricultural Adjustment Act provides that the Secretary of Agriculture may make benefit payments to farmers producing basic commodities who agree to restrict their production of such commodities. The processing tax on each commodity goes into effect only when the Secretary of Agriculture determines to make benefit payments in respect to such commodity. It terminates when such benefit payments cease. The scheme to restrict production is not authorized in order to levy taxes; the taxes are levied in order to provide the essential means of carrying out the scheme. They are an integral part of the scheme, and clearly would not have been authorized if the scheme had not been authorized. If the scheme is unlawful, the taxes are necessarily unlawful, being levied for the sole purpose of carrying out the unlawful scheme. As a matter of fact, if the Secretary of Agriculture cannot lawfully determine to put the scheme into effect, then by the very terms of the Act itself, no tax can be imposed.

THE SCHEME CONSTITUTES A GIGANTIC COMBINATION IN RESTRAINT OF PRODUCTION.

2. The scheme constitutes a gigantic combination to limit the production of agricultural products in order to increase prices of such products. Its object is to give to farmers a fair share of the national income by taxing processors in order to make payments to such farmers as agree to reduce their production. By reducing production, it is planned that higher prices will be obtained by farmers for the reduced amount of products, and such higher prices, plus the benefit payments, will give farmers a fair share of the national income, which the Act determines is the proportionate share they received in 1909 to 1914.

In carrying out the plan with respect to cotton, the Secretary of Agriculture, immediately upon the passage of the Act, entered into contracts with over 1,000,000 cotton growers under the terms of which 10,000,000 acres of growing cotton were ploughed up during the season of 1933 out of a total acreage of approximately 40,929,000, and the production of cotton was reduced by 4,400,000 bales, or approximately 80% of the amount annually consumed in the United States, and in 1934 15,000,000 acres were taken out of cultivation. The annual cotton taxes levied for the purpose of making these payments and paying the expenses in connection therewith are approximately $116,000,000 annually.

IF THIS LEGISLATION IS LAWFUL, THE UNITED STATES HAS ALMOST UNLIMITED POWER OVER PRODUCTION IN THE STATES.

3. It is clear that if the United States has the power to pay such benefits to those who consent to carry out such a scheme, it follows that Congress has power to carry into effect in the States any policy which it pleases in respect to agriculture, manufacturing, mining, labor relations, or

otherwise. There are few, if any, things it can not accomplish if sufficient inducement is offered.

The power to tax is the power to destroy. A power, backed by the taxing authority of the United States, to confer benefits on those who conform to its wishes and to withhold benefits from others is a power to coerce or destroy those who do not conform.

FUNDAMENTAL PRINCIPLE THAT POWER GRANTED UNITED STATES SHOULD NOT BE SO CONSTRUED AS TO NULLIFY POWERS CLEARLY RESERVED TO THE STATES.

4. The United States can exercise only the powers granted by the Constitution. All powers not so granted are reserved to the States or people, which reservation of rights is expressly affirmed and emphasized by the Tenth Amendment. The Constitution provides for a system of dual sovereignty. Each citizen is a citizen of the United States, owing it allegiance in respect to matters which the United States is entitled to control, and a citizen of his State, owing it allegiance in respect to matters which such State is entitled to control.

It is a basic principle of the Constitution that the United States shall be protected in the exercise of its granted powers and the States equally protected in the exercise of the powers confided and reserved to them, and that the rights of neither shall be impaired. Any action by either which impairs or destroys the rights of the other is repugnant to the Constitution and unlawful. If an apparent conflict arises between the powers granted the United States and the powers reserved to the States, it has been held that neither should be so interpreted or enforced as to "nullify or substantially impair the other".

CONTROL OF AGRICULTURE IS RESERVED TO THE STATES.

5. The control of agriculture is admittedly reserved to the States. The States have the right and duty to control it in so far as it can constitutionally be controlled.

The States have exercised their right of control. The Constitutions, laws or public policy of all the states forbid such a combination as the present to restrict agriculture in order to enhance prices.

CONTENTIONS OF THE GOVERNMENT.

6. The United States claims the right to enact the present scheme of regulation on the following grounds:

A. It contends that though Congress has no right to control or legislate with respect to agriculture, it has the right under Article I, Section 8, of the Constitution, "to levy . . . taxes . . . to . . . provide for the general welfare of the United States", and that this so-called "welfare clause" gives it the right to levy taxes and appropriate the proceeds not only for matters in respect to which it can legislate, but in respect to all matters which it determines are for the general welfare of the United States. It contends that it can exercise this power of appropriation to pay money to those who conform to its wishes, and thus regulate agriculture not by direct legislation, but by granting or refusing benefits, and in this manner can lawfully put into effect the present plan, the direct purpose of which is to limit the production of agricultural products within the States and under which practically all the farmers of the country growing basic commodities have entered into a combination drastically to limit their production.

B. The Government further contends that the banks organized by it have the right to loan money on mortgages to the farmers; that these banks hold some 18% of all farm mortgages; that the Government, having created these banks, may preserve them, and in order that they may be able to collect on their mortgages, the United States may regulate not only the particular mortgages

which they hold or the business of these particular mortgagors, but the entire agricultural industry.

OUR CONTENTIONS.

7. We contend:—

A. That the Madisonian interpretation of the welfare clause is the proper interpretation, viz.: that by the "general welfare of the United States" is meant those matters in respect to which the United States is authorized to act and with which it is concerned, and that under this interpretation, since the United States is not authorized to legislate or deal with agriculture, it is not within the "general welfare of the United States" and Congress, therefore, cannot levy taxes for the purpose of any such plan as the present concerned with agriculture.

B. That if the broader Hamiltonian interpretation of the welfare clause is adopted, and Congress can levy taxes to carry out its granted powers and also appropriate tax money for other purposes in respect to which it cannot legislate or which it can not regulate, nevertheless, Congress can not use this mere right to appropriate, as in the present case, to bring about the regulation of agriculture which, by the express terms of the Constitution, it is forbidden to regulate.

C. That the right of Congress to authorize the creation of banks which can make agricultural loans, and loans to industry, does not empower it to regulate all agriculture or all industry.

D. That the taxes imposed on cotton manufacturers to be paid to cotton growers not to induce them to perform a service to the public, but for their own benefit, violate the due process of law provision of the Fifth Amendment.

MADISONIAN INTERPRETATION OF THE WELFARE LAUSE IS CORRECT.

8. We submit that the Madisonian interpretation of ne welfare clause which permits Congress to tax only or the purpose of carrying out its granted powers is correct.

If we look only at the Constitution, this is the fair meaning of the words themselves. The United States was organized, as the Preamble of the Constitution provides, among other things, "to promote the general welfare." t must be presumed that all powers were granted the Jnited States which it was deemed necessary it should xercise in order to provide for the national general welare which it was the purpose of the Constitution to promote. The responsibility for the general welfare in relaion to other matters was confided to the States. The Jnited States is concerned with the general welfare relating to matters confided to it; the States are concerned vith the general welfare in respect to matters for which hey are responsible and for which they have a duty to rovide. The right to tax would naturally be given to the Jnited States to enable it to carry out matters for which t was responsible. It would be unnatural to give it power o tax for the purpose of applying the proceeds to matters in respect to which the States have the right and duty o provide and for which they have power to tax. The Jnited States has power to tax to pay the debts of the Jnited States, to provide for the common defense of the Jnited States, and the general welfare of the United States. This general welfare is clearly the general welare in respect to matters for which it is responsible and ot the general welfare for which the States are responible.

This view is confirmed by extemporaneous circumstances. The original taxing provision as adopted by the

Constitutional Convention merely gave power to lay taxes. This would clearly have limited the United States to taxing in order to carry out its powers granted to it. It is clear that the words "to pay the debts and to provide for the common defence and general welfare of the United States" were added solely for the purpose of emphasizing the right of the United States to tax for the purpose of paying the obligations of the United States under the Articles of Confederation, which by the express terms of the Articles of Confederation, included the debts of the States incurred "for the common defence and general welfare." In other words, under the Articles of Confederation the debts incurred by the States for Federal purposes were to be repaid them by the United States. Sherman, who originally suggested these words, and the Committee which adopted and proposed the final wording of the taxing clause, clearly had no idea that they could be construed as giving the vast power now claimed. They were adopted without debate, although the Committee which recommended them and the Convention which adopted them without debate had many members such as Madison, Williamson, and others who strongly opposed the Hamiltonian interpretation and, like Madison, insisted that it had never even been suggested until after the adoption of the Constitution that the phrase could be so construed. The Hamiltonian construction was not suggested in the *Federalist* or by any responsible person in any of the discussions preceding the adoption of the Constitution. It was not thought of until advanced by Hamilton, as Secretary of the Treasury, for the purpose of giving the United States greater power in conformity with Hamilton's views of what the Constitution should have provided and not in accordance with what it did provide.

Contrary to the often expressed opinion, Hamilton's view was bitterly opposed in the early Congresses, and there is not a clear-cut instance of its acceptance in legislation until after the Civil War, and it is only comparatively recently that it has been acted upon except in sporadic instances.

HAMILTONIAN INTERPRETATION OF WELFARE CLAUSE.

9. If the Hamiltonian interpretation is adopted, it does not authorize the present legislation.

Hamilton admitted that the right to appropriate for objects other than the powers granted the United States does not give Congress the power to control or legislate with respect to such objects. Otherwise, the United States would have unlimited powers, since all that would be necessary to enable it to control a subject matter would be to appropriate money towards it and then legislate in respect to such subject matter and thus control it.

It is clear, then, that if the Hamiltonian interpretation is accepted and the United States has the right to appropriate for objects beyond its granted powers, the United States is not authorized to control such objects. The government's sole right under this doctrine is to apply money to agriculture—not to control it.

Under the Hamiltonian doctrine, the United States remains a government of strictly limited powers. It admittedly has no power to regulate agriculture; the power to regulate agriculture is admittedly reserved to the States by the Tenth Amendment.

The right to tax under the Hamiltonian interpretation restricts the purposes for which the tax may be levied; it must be levied to pay the debts of the United States, to provide for the common defense of the United States, or to provide for the general welfare of the United States.

The Government admits that the right to tax and appropriate the proceeds for the general welfare has limitations. Thus, it admits that the tax can only be levied for purposes which are general, as distinct from local, national, as distinct from State. (Brief, p. 138.) We submit that this right is necessarily subject to a further limitation. The right to appropriate can not be exercised for unlawful purposes, including purposes repugnant to the express terms of the Constitution itself.

The Constitution provides that the States shall have the exclusive right to regulate agriculture. Taxes levied by Congress for the express purpose of being appropriated in such manner that they necessarily regulate agriculture on a vast scale and for the express purpose of so regulating it, are levied and appropriated for the express purpose of accomplishing an object wholly repugnant to and forbidden by the Constitution.

The mere right to appropriate or apply money to a purpose can not be so construed or exercised as to permit Congress to exert a regulation over local affairs which the Constitution expressly denies Congress the right to regulate. Otherwise, we reach the absurd result that the express intent of the Constitution to confide the regulation of agriculture and other local matters to the States can be nullified by the simple expedient of appropriating money for such matters on conditions which bring about the regulation which the Constitution forbade Congress to impose. There are few schemes of regulation of local matters which Congress could not effect by laying down a scheme and paying benefits to those who conform.

If this principle is established, then, for practical purposes, the principle that the United States is a government of enumerated powers only, the regulation of other matters being left to the States, can be completely nullified. The right to appropriate money would, for prac-

tical purposes, be given the same effect as though the right were expressly granted to the United States to control to such extent as from time to time it saw fit, all local matters. The Constitution would be construed as giving the United States power to completely defeat its express purposes and intent.

We submit that the right to tax and appropriate the proceeds for the general welfare of the United States can be given no such interpretation. Legislation directly intended and having the direct result of regulating agriculture or other local matters violates the purpose, intent, and express provisions of the Constitution, and is unconstitutional and, therefore, unlawful. A tax levied in order to appropriate the proceeds for the purpose of defeating the intent and express provisions of the Constitution can not be deemed for the "general welfare of the United States."

The United States contends that the combination authorized in the present case between the Secretary of Agriculture and the farmers to limit production is voluntary, and therefore lawful. A combination or conspiracy to restrain trade or limit production is not made lawful because voluntarily entered into by the individuals who are parties to it. Practically every combination to restrain trade or limit production is voluntary on the part of the members, but it is well recognized that this constitutes no defense. An unlawful regulation either of interstate commerce or intrastate commerce or production can not be converted into a lawful combination because the members of the combination act voluntarily.

Furthermore, the combination in the present case is not voluntary. The benefits are devised to make it necessary on the part of the farmers to join, as a practical matter. As this court has held, action so induced is induced by coercion.

The principle that a sovereignty can not induce action which is beyond its jurisdiction to control by granting a benefit to those who conform and denying it to those who refuse to conform has been recognized in a large number of cases in this court, such as the Child Labor cases, *Hill* v. *Wallace*, and numerous cases holding unlawful a grant by a State of a permit to do business to a foreign corporation which conforms to the wishes of the State in respect to a matter beyond its jurisdiction, and the refusal of such permit when the foreign corporation declines to conform. The principle of these cases is clearly applicable in the present case.

The right to appropriate, which admittedly gives no right to control, can not be used for the direct purpose of thus controlling matters beyond the jurisdiction of the States. If so, the basic principle of the Constitution—the division of authority between the United States and the States—will be destroyed.

THIS LEGISLATION IS NOT JUSTIFIED AS A MEANS OF CARRYING OUT THE FISCAL POLICIES OF THE UNITED STATES.

10. The contention that the United States can directly regulate agriculture, in order to enable the Federal Land Banks, Joint Stock Land Banks, and other similar agencies of the United States, to collect the farm mortgages which they hold, requires little discussion.

If this contention is correct, it means that the United States, in order to enable the national banks to collect on their loans, which have been made to practically every industry in the country, can regulate all industry and thus destroy the entire basis on which the Constitution is founded.

THE PROCESSING TAXES VIOLATE DUE PROCESS OF LAW.

11. The taxes in the present case also violate the due process clause of the Fifth Amendment.

They are levied on cotton manufacturers and the proceeds paid to farmers who reduce their production of cotton. The purpose is to enable cotton growers to receive higher prices for the cotton they do produce, and thus, by reason of these higher prices received for their products and the receipt of the benefit payments, to obtain a fair share of the national income.

It is to be noted that the Act does not provide for taxing the income of cotton manufacturers and distributing it to farmers to enable the farmers to increase their incomes, and thus to equalize incomes. Cotton manufacturers must pay the tax, whether or not they make a profit or a loss. As a matter of fact, a large portion of the cotton textile manufacturers have not had any income but have suffered only losses since the Agricultural Adjustment Act was enacted.

Payments are not made to farmers because of their poverty. The richest man in the country, if a cotton grower, is urged and has the right to receive the benefit.

The important fact to bear in mind, however, is that these benefits are not paid to cotton growers to induce them to render a service to the public. On the contrary, they are required by the plan to reduce their crops, thereby necessarily discharging farm laborers and furnishing less cotton to the public at higher prices.

The only contention made by the Government that the public receives a benefit is the contention that the cotton growers, by reason of these benefit payments and increased prices, will have more money to buy manufactured goods and thus will indirectly benefit manufacturers and their employees. It is somewhat difficult to see why, if this money were not taken from the cotton manufac-

turers, they and their stockholders (in the case of a corporation) would not equally be in a position to spend more money and thus equally benefit manufacturers and their employees.

Disregarding this, however, the contention of the Government merely means that if money is taken from one class and given to another class, this other class will probably spend it. This is simply and solely a redistribution of wealth by government decree. It is clearly arbitrary and capricious and violates the due process of law provision of the Fifth Amendment.

II.

ANALYSIS OF THE AGRICULTURAL ADJUSTMENT ACT.

A. PROVISIONS OF THE ACT.

The provisions of the Agricultural Adjustment Act which are pertinent to this discussion may be briefly summarized as follows:

The Act contains a preamble entitled "Declaration of Emergency" setting forth that the disparity between prices of agricultural commodities and other commodities has broken down the orderly exchange of commodities and seriously impaired the agricultural assets supporting the national credit structure, and it is declared that these conditions have affected transactions in agricultural commodities with a national public interest and have obstructed the normal currents of commerce in such commodities.

The Act authorizes the Secretary of Agriculture to provide for reduction in acreage and production for market of any basic agricultural commodity, "through agreements with producers or other voluntary methods," and to provide "for rental or benefit payments in connection" therewith. (Sec. 8 (2).) Basic commodities are defined in Section 11 to include cotton, wheat, rye, flax, barley, field-corn, grain, grain sorghums, hogs, cattle, rice, tobacco, sugar beets and sugar cane, peanuts, and milk and its products, and potatoes. A few of these commodities have been added by amendments since the passage of the original Act. Upon the determination and proclamation of the Secretary of Agriculture that rental or benefit payments are to be made with respect to any basic commodity, a processing tax is to go into effect at the beginning of the next marketing year on the domestic

processing of such commodity. (Sec. 9 (a).) The rate of the tax is to be determined by the Secretary so as to make it equivalent to the decline in purchasing power of the basic commodity from the base period, which in the case of cotton is defined as the period, August 1909 to July 1914. (Sec. 2.) Provision is made for adjustments by the Secretary of the rate under certain circumstances.

The processing tax in respect to any commodity is to terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity.

Section 12 appropriates the proceeds of the processing taxes to the payment of rentals and benefits.

The Secretary of Agriculture is also authorized to give producers of cotton, options to purchase cotton owned by the United States to an amount not in excess of the reduction in the production of cotton which may be made by such producer below the amount produced by him in the preceding year, but in all cases where such options are given the producer must agree in writing to reduce the amount of cotton produced by him in 1933 below his production for the previous year by not less than 30 per cent, and without any increase in commercial fertilization per acre; and he must further agree not to use the land taken out of cotton production for the production for sale of any other nationally produced agricultural commodity. (Sec. 6.)

The Secretary of Agriculture is authorized with the approval of the President, to make such regulations with the force of law as may be necessary to carry out the powers vested in him. (Sec. 10 (c) (d).)

The powers given the Secretary of Agriculture to make agreements for the reduction of crops and to make such

rental and benefit payments on account thereof are given him for the purpose of enabling him "to effectuate the declared policy" of the Act (Sec. 8), which declared policy is set forth in Section 2.

The declared policy is to re-establish prices to farmers which will give agricultural commodities a purchasing power with respect to articles farmers buy, equivalent to the purchasing power of such agricultural commodities in the period August 1909 to July 1914, except in the case of tobacco for which the period is August 1919 to July 1929.

The Act has been amended by Section 35 of the Public Acts No. 320, 74th Congress, affirmed August 24, 1935, but these amendments enacted after the imposition of the taxes involved in this case are not pertinent to the discussion contained in this brief.

B. PURPOSES OF THE ACT.

DIRECT PURPOSE.

The direct and immediate purpose of the Act is to reduce production of agricultural commodities in order to raise the prices received by farmers for these commodities. This is to be accomplished by levying a tax on domestic processors of these commodities to be paid to farmers who agree to reduce their crops.

OTHER PURPOSES.

The Act sets forth a declaration of emergency and a declaration of policies which are, at first sight, somewhat confusing. Stripped of verbiage, the Act is based upon the following economic theories and intended to accomplish the following direct as well as ultimate purposes. These theories and purposes are apparent upon a careful reading of the Act, and are set forth in chapter 1 of the "Report of the Administration of the Agricul-

tural Adjustment Act," (hereinafter referred to as "Report") the first subsection of which is entitled, "Why the Act Was Passed". Other facts on which the government rests its economic theories are set forth in a pamphlet entitled, *Economic Bases for the Agricultural Adjustment Act,* published in 1933 by the Department of Agriculture.

For some time prior to 1929, it is contended that farm products could be exchanged for relatively less industrial goods than in the four years preceding the War.

> "Even at the crest of the business cycle in 1929, farm products could be exchanged for only 91 per cent as much of other products, on the average, as they could be exchanged for in the period before the war." (Report p. 1.)

By this it is not meant that in 1929 farmers obtained less in exchanging their products than they did in the pre-war period. The total national income rose greatly and the farmers shared in this increase. The contention merely is that they did not get their fair percentage or proportion of the increase.

> "Between 1921 and 1925 farmers shared in the rise in national income, but that share [of the total] was less than before the war." (*Economic Bases for the Agricultural Adjustment Act,* p. 6.)

When the depression came, this so-called disparity, it is contended, increased. "By February, 1933, the exchange value of farm products for industrial goods had fallen to 50 per cent of the pre-war average." (Report p. 1.)

The reason for this reduction in prices for farm products was the usual one which affects prices; namely, supply and demand. "The immediate cause of this disparity was the pressure of surpluses of farm products

on the markets." (Report p. 1.) ". . . a surplus is a quantity so abundant as to depress prices below a figure which will adequately reward the producer. . . . A surplus always means a surplus at some particular price. At a lower price the surplus is absorbed and so disappears." (Report p. 1.) In other words, supply exceeded demand at the price which the government contends gave an "adequate reward". A consequence of the failure of the farmer to receive an adequate reward was that he had less money to purchase manufactured goods. Thus manufacturers suffered due to lack of purchasing power by the farmers and employees were thrown out of work. (Report p. 3.) It was contended that if the farmers could be given a larger return this would, in the first place, help the farmers and in turn, it would enable them to purchase more manufactured goods and thus help manufacturers and their employees. It would also enable the farmers to pay interest on their mortgages and increase the value of their farm lands and thus help the banks and insurance companies holding mortgages, and, in general, assist in the return to prosperity.

Merely to increase prices to the farmer sufficiently to give him an "adequate return" would result in increased production, increased surpluses and, therefore, would result in an increased burden on the government to maintain prices at a level in excess of prices determined by the normal operation of demand and supply. (Report p. 5.) It was, therefore, deemed necessary not only to provide that the farmer receive an adequate price, but also to cut down production so that the supply would not tend to keep prices at less than an "adequate price"; in other words, to adjust supply and demand on a level which would keep prices at the point desired by the government.

The desired price level was not a fixed price but one which was deemed to give the farmer for the exchange of his products the same relative purchasing power which he had in the pre-war years 1909 to 1914.

> "It is because of the series of maladjustments brought about by the surplus of farm products that the Government has undertaken to control their production, bringing supplies into line with demand at a price which will afford the farmers a return commensurate with their income during the 5 pre-war years. (Report p. 3.)
>
> ". . . The evident purpose of the act is to promote the prosperity of the farmer by returning to him a fair share of the national income and to foster national recovery by making the farmer as good a customer for non agricultural industries and services as he was before the World War." (Report p. 4.)

POWERS GRANTED TO ACCOMPLISH THESE PURPOSES.

The Report refers to the two groups of powers provided for in the Act: "those dealing with production control and those dealing with marketing agreements and licenses". (Report p. 5.)

The first group of powers provides for reducing production and thus supply.

> "Authority granted for this purpose recognizes the existence of overproduction and of a burdensome surplus of many farm products; it recognizes the necessity of reducing this oversupply and refraining from further overproduction that maintains and adds to it if the farmer is to receive his fair share of the national income. . . . It provides a method of giving financial assistance through benefit payments to farmers who, voluntarily and not otherwise, cooperate with the government in making the necessary adjustment." (Report p. 5.)

The other group of powers authorizes the Secretary of Agriculture to control marketing and thus to assist him to restore parity prices and at the same time protect the consumer. (Report p. 6.)

> "The powers conferred by the Agricultural Adjustment Act, then, are directed towards economically balanced production of agricultural commodities on the one hand, looking toward a fairer share of the national income for farmers, and, on the other hand, a system of distributing farm products that will be economically sound." (Report p. 7.)

The processing taxes on any commodity so far as possible "are used for benefit payments to the producers of that particular commodity." (Report p. 10.)

> " . . . the processing tax is the heart of the law. The processing tax is a means of raising revenue for accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." (Report p. 9.)

These two purposes for which the processing tax are levied are as follows:

First. To bring about a reduction in production.

Voluntary efforts of producers to bring about a reduction of crops inevitably comes to naught by reason of the fact that a minority will not cooperate. (Report p. 9.)

> "It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshalled behind the adjustment programs." (Report p. 9.)

Second. The processing taxes constitute a direct payment of so much cash to the farmers thus adding to their income. "The second way in which the processing tax

and benefit plan helps farmers is in making a direct contribution to their income." (Report p. 10.) Thus

"by establishing the parity principle for agriculture, Congress, in the Agricultural Adjustment Act, recognized a fundamental concept of the national recovery program, which is that those large economic groups performing essential functions for society must have a fair share in the national income". (Report p. 10.)

SUMMARY OF PURPOSES.

In other words, this legislation is intended to provide that the farmers shall receive for their products a "fair share of the national income". It authorizes the Secretary of Agriculture to endeavor to accomplish this purpose, first, by a vast combination between himself and the producers of each basic commodity under which the farmers will agree to reduce their production in consideration of the money to be paid them, and those not willing to cooperate will be kept "in line" and made to do so by the inducement or economic necessity of obtaining benefits; and second, by direct payments of cash to the farmers thus increasing their income. The processing tax on each commodity is levied to provide the funds to enable the Secretary to carry out the scheme with respect to that commodity.

The public, it is contended, will be benefited by this increased prosperity and additional purchasing power.

QUESTIONS RAISED.

Two questions are at once raised.

First. Is not the control of agriculture exclusively confined to the States and if so, can Congress constitutionally authorize this plan to control it?

Second. Can Congress levy a tax on processors for the purpose of paying the proceeds to farmers not selected as objects of charity because of poverty, but because it is believed that the transfer of this wealth or purchasing power from the processors to the farmers is required to give them a fair share in the national income and because it is believed that this redistribution of wealth or purchasing power will enhance prosperity or aid in recovery?

The question to be decided in the present case is not whether the plan is economically sound but whether the Constitution confers upon Congress the power to authorize it.*

> "The recuperative efforts of the government must be made in the manner consistent with the authority granted by the Constitution." (*Schechter* v. *United States, supra.*)

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*NOTE. While we do not consider it material there is grave doubt as to the soundness of the economic theory upon which the Agricultural Adjustment Act is based.

1. It is questionable whether the alleged disparity existed. Prices for farm products in the depression undoubtedly fell more than prices for manufactured goods. This was, however, due to larger fixed charges on industry. Manufacturers were for the most part suffering large losses in 1932. Wages were reduced; many employees were out of work or on reduced time. The purchasing power of the manufacturers and their employees was greatly reduced and we doubt if it could be proved that the farmer's purchasing power was reduced in larger proportion. The industrial workers and employers with reduced wages or profits, or none at all, were also buying industrial products at the same prices which farmers paid. The truth is that the national income was reduced by about one-half and the farmer's share was, of course, largely reduced. It would be difficult to prove that the farmer suffered more than other classes.

2. The cost or effort involved in producing farm products has decreased considerably since 1914 due to improvements in farm machinery and methods. If the cost of production of industrial products had remained stable, a bushel of wheat would cost less effort and money to produce and ought to buy less of other products. The question of whether a change in purchasing power of farm products was just, must depend upon relative

decreases in costs or effort required to produce farm products as compared with industrial products.

3. It is impossible to compare the purchasing power or exchange value of agricultural products in 1933 with their purchasing power in the pre-war period. The farmer does not today buy the same products. He now purchases many things not even invented prior to the War, such as radios. Farm machinery, automobiles, and most other products have so changed in character that the combination of articles the farmer may now buy can not be compared with what he bought twenty years ago. Robertson, D. H., *Money*, p. 27) says that the things purchased by the working man change in character so rapidly that "by about 1950, for instance, it may be scarcely more interesting to know the price of the combination of things consumed by the working-class family in 1914 than to know what the price would be in England of the combination of things habitually consumed by Chinamen".

4. There is no particular reason why the years just preceding the War should be taken as a standard of exchange value to which farmers are entitled. The world is not static. "The tendency still persists in economic matters to attribute a peculiar sanctity to the year 1914; all sorts of people who were very discontented at the time tend to look back to it now as having been in some sense the 'normal' or standard year for all time." Robertson, D. H. (*Money*, p. 26.) "Under the changed conditions of technical efficiency in industry and agriculture and with the new standards of personal needs and tastes, the restoration, for example, of the old price relations would require a distribution of the national income absolutely different from what it was twenty-five years ago." (*Economics of the Recovery Program*, p. 157.)

5. The transfer by means of taxation and benefit payments of money purchasing power from processors or the general public to the farmers "does no more than exploit one class at the expense of another, unless it is accomplished by an increase in 'goods', 'purchasing power', or production." (*Economics of the Recovery Program*, p. 24.) In other words, unless the transfer of money from processors to farmers, increases the amount of commodities produced and therefore the national income, it merely benefits one class at the expense of the other. Here we have not an increase but a reduction of production expressly sought. Mere transfer of purchasing power from one class to another can not increase prosperity; the total purchasing power is not thereby increased; nor is it an aid to recovery. The problem of recovery is to increase the production and use of goods by all classes.

When the transfer of property from one class to another is accompanied, as in the present case, by a reduction in production resulting in an enormous decrease in the employment of farm laborers, great losses suffered by ranchmen and dairymen due to the scarcity and high price of cottonseed cake and meal resulting from the reduction in production of 3,500,000 tons of cottonseed (See Article by A. B. Cox referred to below),

and increased prices of agricultural commodities to the public, it may well be doubted if it aids recovery.

6. It is very doubtful if the plan even aids the cotton growers for whose direct benefit it is enacted. There has been a decreased use of cotton in the United States of 329,000 bales in the year 1934-1935 over the previous year, although other businesses have increased production. Cotton production outside the United States for the past year was over 2,500,000 bales larger than for 1932-1933, and over 2,000,000 bales more than the five-year pre-depression average. In other words, foreign production is making up for our restriction, and as over half our cotton must be sold abroad, and it is sold at world prices, we are apparently to lose our market by the amount we reduce production, so that we can not regain it except by drastic reductions in price. By selling more cotton at a lower price, cotton growers would be as well off, and would retain their foreign markets. (See *The Cotton Situation Approaches a Crisis*, A. B. Cox, Director, Bureau of Business Research, University of Texas.)

III.

THIS LEGISLATION AUTHORIZED A DRASTIC REGULATION OF AGRICULTURE.

A. THE ACT AUTHORIZED A GIGANTIC COMBINATION TO RESTRICT PRODUCTION IN ORDER TO ENHANCE PRICES.

The Agricultural Adjustment Act obviously contemplates and authorizes the Secretary of Agriculture to create an immense and far-reaching combination to restrict the production of agricultural products for the purpose of raising prices. No such gigantic scheme has ever been undertaken in this or any other country. If undertaken by individuals, it would, of course, be characterized as an unlawful conspiracy to restrict production and enhance prices. Unless the United States has been empowered by the Constitution to authorize this combination, it must be characterized in the present case in the same manner.

An unconstitutional act is no act at all and gives no authority. "It is, in legal contemplation, as inoperative as though it had never been passed", (*Norton* v. *Shelby County,* 118 U. S. 425, 442).

The Secretary of Agriculture, therefore, when acting under unconstitutional legislation has only such rights as he may exercise in his individual capacity. If the plan carried into effect by him as an individual would be an unlawful conspiracy, it remains an unlawful conspiracy unless he can show the United States was granted by the Constitution power to authorize it.

That the Agricultural Adjustment Act contemplated this vast combination and no minor undertaking which might have no substantial consequences is self-evident from the objectives of the legislation, the purposes of

which were to rid the country of an immense surplus of basic agricultural products and to reduce the supply so that the prices for these basic agricultural products would be increased between fifty and one hundred per cent. These results could not be accomplished except by a far-reaching scheme which was to be adopted and entered into by the Secretary of Agriculture with the large majority of, if not practically all, the farmers growing these basic products. What the Secretary has done under the Act is obviously in accordance with what was contemplated and authorized and what was necessary to carry out the purpose and intent of the Act.

B. THE CARRYING OUT OF THE ACT HAS RESULTED IN A DRASTIC REGULATION OF AGRICULTURE.

(1) EXECUTION OF THE SCHEME OF REGULATION FOR 1933 IN RESPECT TO COTTON.

The Secretary of Agriculture, upon the passage of the Act, took immediate action. He determined that benefits should be paid to cotton growers and with the approval of the President, he adopted Cotton Regulations, Series 2, providing that the first cotton marketing year should begin August 1, 1933, and that the processing tax should be in effect from that date at the rate of 4.2 cents per pound of cotton processed. He also determined to make certain cash payments to cotton growers who conformed to the plan of restriction and as an alternative, in lieu of a portion of the cash payments, offered them options on cotton held by the government.

In accordance therewith he promulgated the terms of the benefit payments and options which were offered by the government and the reduction in acreage and other conditions to which the cotton farmer accepting the benefits was required to agree.

The Report of the administration of the Agricultural Adjustment Act, entitled "Agricultural Adjustment" sets forth the scheme adopted and carried out.

The Secretary determined that there were approximately 40,929,000 acres in cotton cultivation on July 1, 1933. He determined that the minimum objective for 1933 must be the elimination of 10,000,000 acres. Since the year's crop was already planted, he determined this amount of planted cotton must be plowed up and destroyed. He determined that $110,000,000 in addition to options on cotton owned by the government should be paid cotton growers to induce or compel them to agree to destroy these plantings. (Report p. 23.) He estimated that the processing taxes for the year would be $116,000,000 (Report pp. 28 and 29). The contracts offered the cotton growers for the year therefore provided (1) that each cotton grower should take out of production, that is plow up, the cotton then growing on a specified number of acres of his land; (2) that he would not use on his remaining crops any more fertilizer than was used in 1932; (3) that the Secretary should have authority to destroy the crops on the specified acres if the cotton grower failed to do so; (4) the farmer, in consideration of his agreement, was to receive a specified cash payment per acre or, at his option, a lesser amount of cash and an option on certain government owned cotton.

By regulations having under the Act the force of law, it was provided that all producers of cotton who had agreed to reduce the amount of their cotton should plow under the same on or before September 18, 1933; and if they failed to do so, any person authorized by the Secretary was empowered to enter and take action to that end, the cost to be borne by the producer. (Cotton Regulations, Series 1, Supplement 1, approved September 18, 1933.)

A vast campaign was inaugurated to induce farmers to contract which, outside Washington, cost $2,799,000 (Report p. 28). In this campaign 2,200 county agents constituted the "shock troops" "out on the firing line" (Report p. 27). In the 956 counties in which contracts were made there were approximately 22,000 local workers. In many cases, schools of instruction were held before these workers entered into the campaign (Report p. 27). News releases were sent to 664 dailies and 3,500 weekly papers, and special articles were prepared for the farm magazines (Report p. 27). As a result of the campaign, 1,026,514 different contracts were entered into and 10,400,000 acres of growing cotton were plowed up and the production of cotton reduced by 4,400,000 bales, which is about 80% of the amount used domestically in the United States. (Report p. 28.)

(2) EXECUTION OF THE SCHEMES OF REGULATION OF 1934 AND 1935 WITH RESPECT TO COTTON.

The program for 1934 contemplated a reduction in cotton acreage of 40% from the 1928-1932 average acreage, making it possible in 1935 to have a reduction of 25% (Report p. 38). Benefit payments of 3½ cents per pound for the cotton so not to be grown, plus not less than one cent per pound on each processor's share of the cotton domestically consumed, were to be paid (Report p. 39). It was planned that 15,000,000 acres should be eliminated from cultivation (Report p. 39).

The contract for 1934 contained the following terms (Report pp. 331, 332):

> "The Producer shall—
>
> (1) Reduce the acreage to be planted to cotton in 1934 on this farm by not less than thirty-five percent (35%) and not more than forty-five percent (45%) below the base acreage; provided, however, that the

total reduction of all producers offering to enter into 1934-1935 Cotton Acreage Reduction Contracts within the above named county or parish shall not exceed forty percent (40%) of the total base acreage of such producers.

(2) Not grow cotton during 1934 and 1935 on land owned, operated, or controlled by him unless such land is covered by a 1934 and 1935 Cotton Acreage Reduction Contract, except as provided in regulations or administrative rulings.

(4) Not increase on this farm in 1934 above 1932 or 1933 (a) total acreage planted to crops including the rented acres; (b) the acreage planted to each crop for sale, designated in the Act as a basic commodity, except as may be permitted under the contract between the producer and the Secretary; (c) the number and kind of livestock designated as a basic commodity in the Act (or a product of which is designated) kept for sale (or the sale of a product thereof).

(5) Use the rented acres only for: soil-improving crops; erosion preventing crops; food crops for consumption by the producer on this farm; feed crops for the production of livestock or livestock products for consumption or use by the producer on this farm; or fallowing; or such other uses as may be permitted by the Secretary or his authorized agent.

(9) Comply with the terms hereof and of all regulations or administrative rulings which have been given or may hereafter be prescribed by the Secretary with reference to 1934 and 1935 Cotton Acreage Reduction Contracts, and any violation of said terms, regulations, rulings, or any material misstatement herein, or in any information furnished by the producer, shall be grounds for the cancellation of this

contract by the Secretary. In the event of such cancellation, the producer shall repay to the Secretary any sums theretofore paid hereunder to the producer. The determination of the Secretary that any such violation or misstatement has occurred shall be final and conclusive."

(3) EXECUTION OF SCHEMES OF REGULATION WITH RESPECT TO OTHER CROPS.

We have not space to detail the contracts entered into in respect to other agricultural products.

In respect to wheat, the plan contemplated contracts with 550,000 growers, the removal of 7,595,000 acres from cultivation, and payments to farmers of $95,000,000 in benefits (Report p. 43). In respect to tobacco, approximately 275,000 government signed contracts were entered into with growers who agreed to drastically reduce their crops (Report p. 69). In respect to corn and pigs, $350,000,000 was contemplated for benefit payments. Approximately 1,500,000 farmers were asked to sign contracts and a reduction of 25% was required in respect to hogs and 20% in respect to corn (Report p. 69).

(4) OTHER MEASURES INITIATED SHOW INTENTION TO EFFECT CONTROL.

Other means to assist the plan were undertaken by the government.

As respects cotton, the government sponsored a cotton growers marketing agreement under which no new gin could be established or old gin eliminated without the Secretary's consent, and under which maximum rates for ginning were fixed (Rep. p. 40). In addition, in order to bring into the plan those who could not be made to enter under the authority of the Agricultural Adjustment Plan, the government passed the Bankhead Cotton Control Act and the Kerr Tobacco Control Act (48 Stat.

598, Approved April 21, 1934, and 48 Stat. 1275, Approved June 28, 1934, respectively). The Bankhead Act provides for a tax of 50% of the average central market price per pound of lint cotton but in no event less than five cents per pound on the ginning of cotton which is in excess of 10,000,000 bales for the crop year of 1934-1935. Farmers who grow within the amount allotted to them by the Secretary of Agriculture are exempt from the tax. The Kerr Tobacco Act provides a drastic tax on tobacco for those producing in excess of their allotments.

C. THE REGULATION ACHIEVED AND THE REDUCTION OF PRODUCTION HAVE PRODUCED RADICAL EFFECTS ON THE INTERNAL ECONOMY OF THE STATES.

It needs no extended statement to show the enormous extent to which these plans and regulations affect the internal economy of the States. The question is not whether these plans are economically sound and beneficial. The question is, to what extent they regulate, control, and intermeddle with agriculture, a matter exclusively within the jurisdiction of the States.

As respects cotton, 15,000,000 acres or 40% of cotton producing land was made idle for the 1934 crop. The prosperity of many of the States is largely dependent on their cotton crops. At even $30 an acre, $450,000,000 of taxable land was made idle. The number of farm hands, croppers, etc., required to plant and harvest these crops who, in consequence, are thrown out of employment alone presents a serious problem. In States producing cotton and also having cotton mills, the supply of cotton has been decreased and the cost greatly increased, which may cause serious effects on the operation of the mills and upon the demand for labor. In respect to other crops, the effect is equally great.

That this effect upon the States deeply concerns them can not be questioned.

In *Wyoming* v. *Colorado,* 286 U. S. 494, 502, where suit was brought by the State of Wyoming against the State of Colorado with reference to diversion of irrigation water, in which case objection was made that the rights of individuals only were concerned, the Court said:

> "As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the State are indissolubly linked with the rights of the appropriators."

IV.

IF THIS LEGISLATION IS CONSTITUTIONAL, IT NECESSARILY FOLLOWS THAT CONGRESS HAS AN ALMOST UNLIMITED POWER TO IMPAIR THE CONTROL BY THE STATES OVER THEIR INTERNAL AFFAIRS.

It is clear that Congress can not directly regulate or control agriculture, manufacturing, or any of the other internal affairs of the States and that for Congress to do so would violate the Constitution in a two-fold sense: *first,* because Congress would exercise a power not conferred upon it; and *second,* because such action would intermeddle and interfere with matters, jurisdiction of which is expressly reserved to the States.

Yet if Congress can constitutionally authorize the present scheme, it follows that it has practically unlimited power to intermeddle with and control matters which the Constitution intended should be exclusively controlled by the States.

Under the present legislation, Congress does not directly prohibit. It controls by offering inducements in the shape of benefit payments to those who conform to its scheme. When the power to confer financial benefits on those who conform to the wishes of the donor of the benefits is backed by the unlimited taxing power of the United States, there is little limit to the extent of the regulation and control which can be effected. In cases where Congress really desires to control, it is as effective a means as the power to prohibit.

If the United States by this means can carry through the present gigantic scheme of regulation and restriction, it is clear that it can put into effect any Congressional policy, no matter how much it may interfere with the

internal economy of the States, by merely paying enough to see that such policy is carried out. There are few things which men would be unwilling to do in the way of conforming to Congressional policies, and few things which, therefore, could not be accomplished, were sufficient inducement offered.

It would be no defense to such interference with State matters that the action was voluntary, but it can not be called voluntary in any real sense. Benefits in this case and in all cases can be so calculated as to compel those to whom they are offered to accept or suffer serious economic consequences,—the destruction of their business and the loss of their livelihood. **The power to tax is the power to destroy. The power to confer or withhold unlimited benefits is the power to coerce or destroy.**

Let us examine a few of the results which could be accomplished under this doctrine.

Clearly, the United States could bring about through this means the purposes this Court held it could not accomplish directly in the *Schechter* case (*supra*) and the *Railroad Retirement case* (55 Sup. Ct. Rep. 758); by conferring benefits on those who conformed to its wishes, it could make it impracticable not to conform.

In the field of agriculture it could proceed much further than it has attempted to proceed in this Act and accomplish a complete regimentation of farmers. Indeed, if the present scheme is regarded as successful and its legality sustained, the United States will probably do so.

In the Report of the Administration of the Agricultural Adjustment Act, May, 1933, to February, 1934, is a chapter entitled "Planning for the Future" (p. 271). It is there stated that far-reaching and fundamental production adjustment programs which already have been undertaken or are completed must be consolidated into

permanent measures. This long-term planning "means removal of large areas of sub-marginal land from production and the development of well-balanced systems of farming on the farms remaining in production".

It means, the Secretary says, the removal of the owners to other lands or industries, the determination of the amount of agricultural products required in the future, the determination of the regions most available for certain crops and livestock products, and the development of "a regionalized plan" which will employ farm labor and farm land throughout the country in what is determined to be the most suitable manner. By the use of benefit payments all of this can be accomplished by the United States Government.

The effect of such a program may well be practically to destroy the entire economy of some of our States. If the Secretary of Agriculture determines under future legislation that the land in certain States should not be cultivated as unsuitable, he can, by refusing benefits to the owners thereof, compel them to move to other States, or he can induce them so to do by the grant of benefits.

But the effect of this principle is not limited to agriculture. It can equally well be applied to manufacturing and other industries. Benefits can be paid to certain manufacturers if they will reduce production. Benefits can be paid to manufacturers to move out of one State to some other State, determined by an official in Washington to be more suited to such industry.

The agricultural South and West in control of some future Congress, for example, can adopt or authorize the adoption of a "long-time planning" for manufacturing involving a "regionalized plan." Under this it can be determined that the cotton textile manufacturing industry should be conducted only in the South, near the source of raw material. Benefits can then be paid to

New England manufacturers who move their plants South. An official in Washington can determine that shoe manufacturing is too concentrated in New England and that "long-time planning" requires the payment of benefits to manufacturers who move their plants to other districts, and the refusal of benefits to manufacturers who choose to remain in Massachusetts. These suggestions are not idle. They are not dissimilar to the Secretary of Agriculture's proposed "regionalized" plan for agriculture.

It can be determined that large units in manufacturing are uneconomical, and benefits can be paid to small manufacturers, or vice versa.

Is it too much to say that the issue in this case involves the fundamental right of the States to control their internal affairs, and the question whether or not the Constitution gives Congress power virtually to destroy this authority?

V.

THIS LEGISLATION VIOLATES THE CONSTITUTIONS OF MANY STATES, THE LAWS OF OTHERS, AND THE PUBLIC POLICIES OF ALL STATES.

The scheme authorized by this legislation and entered into by the Secretary of Agriculture for the drastic restriction of crops not only undertakes to interfere with and control a subject matter which is within the exclusive jurisdiction of the States, but it also violates the constitutions of many States, the laws of others, and the public policies, as heretofore understood, of all the States.

Thus the Constitution of Alabama, Sec. 103 (Code of Ala., 1923, Vol. 1, pp. 300-1) provides that:

> "The legislature shall provide by law for the regulation . . . of associations . . . combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, . . ."

The laws of Alabama (Code 1923, Chap. 211, S. 5212), prohibit the formation of pools or combinations to regulate the "quantity or price" of products, or to fix or limit the quantity of any article or commodity to be produced in the State.

The Constitution of Arizona of 1910 (Art. XIV, Sec. 15) provides that no association of persons, etc., "shall combine in any manner whatever to . . . limit production . . . of any product or commodity".

The Statutes of Arkansas (Chap. 124, Sec. 7368) forbid combinations "to fix or limit in this State or elsewhere the amount or quantity of any . . . commodity . . . or any article or thing whatsoever."

The Laws of Connecticut (General Statutes 1930, Sec. 6352) make it a criminal offense, punishable by fine of not more than $1000 or imprisonment for not more than five years, or both, to conspire "for the purpose of limiting or restraining production" of any necessity of life for the purpose of increasing the price thereof.

The Constitution of Idaho (Article XI, Sec. 18) prohibits corporations and associations from combining for the purpose of regulating the production of any article of commerce or of produce of the soil or of consumption by the people. By the laws of Idaho (Code 17-4013) a violation is made a criminal offense.

Iowa (Chap. 434 of Code of 1931, Sec. 9906) forbids combinations "to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State".

The Constitution of Louisiana of 1921 (Article XIX, Sec. 14) provides that it is unlawful for any persons to combine for the purpose of forcing up or down the price of any agricultural product or article of necessity for speculative purposes. The Code (Sec. 4924) forbids combinations "to limit or reduce the production or increase or reduce the price of merchandise, produce or commodities".

Maine (Revised Statutes 1930, Chap. 138, Sec. 31) makes a criminal offense the wilful destruction or permitting preventable waste in the production, etc., of the necessities of life, which necessities include food for human consumption.

Michigan (Compiled Laws, 1929, Sec. 16647, Chap. 278, Act. 255 of 1899) forbids combinations "to limit or reduce the production" of any commodity.

In Minnesota the Constitution provides (Art. IV, Sec. 35) that "Any combination of persons . . . to monopolize the market for food products in this State or to inter-

fere with or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy."

By the laws of New Mexico (Chap. 35, Article 29), every contract or combination having for its object or which shall operate to "control the quantity, price, or exchange of any article of manufacture or product of the soil or mine is hereby declared to be illegal," and any violation is made a criminal offense (New Mexico Annot. Sts. 1929).

The North Dakota Constitution (Art. VII, Sec. 146) provides that any combination between individuals having for its object the effect of controlling the price of "any product of the soil" is prohibited and declared "unlawful and against public policy."

PUBLIC POLICY OF THE STATES.

Contracts or combinations entered into for the purpose of restricting the production of any articles, especially articles of necessity such as food products, for the purpose of raising prices, have always been held illegal as contrary to public policy in all our states.

In *Standard Oil Co.* v. *United States,* 221 U. S. 1, Chief Justice White considered at length what was deemed by the common law of England and this country to constitute unlawful restraints against public policy. He analyzed the law as follows (pp. 54, 58):

> "Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result

from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void."

. . . . . .

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions . . . of such a *character as to give rise to the inference or presumption that they had been entered into or done with the intent to . . . bring about the evils, such as enhancement of prices, which were considered to be against public policy.*" (Italics ours)

Recent cooperative marketing acts have to some extent changed the public policy of the States as respects combinations for marketing agricultural products. It is not clear to what precise extent they have changed the public policy of the States so as to authorize combinations affecting prices of articles which they sell on behalf of their members. In considering the law relating to such cooperatives it has been held in a number of cases that their purpose is to market their goods in an orderly manner and that monopoly or unreasonable enhancement of prices is not authorized or attempted or possible. It has not been held that they are authorized to restrict production and it does not appear that in any case before

the courts this has been attempted. The clear implications of the decisions are that such would not be permissible. For example, in *List* v. *Burley Tobacco Growers Cooperative Association,* 151 N.E. 471, 114 Ohio 361, the Ohio court said (p. 476)

> ". . . Nor does the evidence tend to show any agreement to limit or reduce production".

(See Edwin G. Nourse, *Legal Status of Agricultural Cooperation.*)

We submit that combinations directed to restrict production in order to enhance prices violate the constitutions, laws, or public policies of all our States.

The plan put into effect under this legislation is the most gigantic scheme to restrict production ever contemplated.

VI.

THE FOLLOWING RULES OF CONSTITUTIONAL INTERPRETATION ARE APPLICABLE IN THE PRESENT CASE.

A. NO PRESUMPTION OF ANY GRANT OF POWER TO THE UNITED STATES.

There is no presumption that any power has been granted the United States Government.

Mr. Justice Story in *Houston* v. *Moore,* 5 Wheat. 1, 48, said:

> "The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. *Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution;* and, on the other hand, we are bound to support that Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains." (Italics supplied.)

In *Fairbank* v. *United States,* 181, U. S. 283, 289, the Court said:

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; * * * it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally

> construed and that language of restriction is to be narrowly and technically construed. * * * The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In accordance with this rule of construction the Court held a tax on a foreign bill of lading, since it resulted indirectly as a tax on exports, fell within the constitutional prohibition against a tax on exports.

The powers granted the United States and the limitations imposed by the Tenth Amendment must be given a fair interpretation in accordance with their purpose and intent.

B. A PRACTICAL CONSTRUCTION MUST BE ADOPTED WHICH PERMITS THE UNITED STATES AND THE STATES TO FUNCTION WITH THE MINIMUM OF INTERFERENCE EACH WITH THE OTHER.

A practical construction must be applied in interpreting the Constitution, which does not violate the basic principles of the Constitution or destroy or impair the powers intended to be exercised by the federal government and the states, respectively.

In *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, involving the right of the United States to tax fees received by contractors from certain states and municipalities, the Court said that in construing the respective rights of the federal and state governments, recourse may be had to the reason for the rule which limits taxation by the respective governments, namely, "the conviction that each government, in order that it may administer its affairs, within its own sphere, must be left free from

undue interference by the other". The Court added (p. 523):

> "*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co., supra,* at 172), or the appropriate exercise of the functions of the government affected by it. *Railroad Co.* v. *Peniston, supra,* 31." (Italics ours.)

See also *Willcuts* v. *Bunn,* 282 U. S. 216, 225.

In *Dick* v. *United States,* 208 U. S. 340, involving the question of the right of Congress to legislate against introducing intoxicating liquors into Indian country, the Court stated that there could be no "divided authority on the subject." Either the power must be in the United States or in the State. The Court further stated that in deciding the question "we are confronted by certain principles that are deemed fundamental in our governmental system" (p. 353). One principal is that a State has full control over persons and things within its jurisdiction. Another principle is that Congress has power to regulate commerce with the Indian tribes. The Court said (p. 353):

> "These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other."

C. NEITHER THE UNITED STATES NOR A STATE MAY ACCOMPLISH BY INDIRECTION WHAT IT IS NOT AUTHORIZED TO ACCOMPLISH DIRECTLY.

In *M'Culloch* v. *Maryland,* 4 Wheat. 317, 423, Chief Justice Marshall said:

> "* * * * * * * * Should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land."

In *Linder* v. *United States,* 268 U. S. 5, 17, the Court said:

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

In *Fairbank* v. *United States,* 181 U. S. 283, a stamp tax imposed by the United States on foreign bills of lading was held unconstitutional as violating the prohibition against taxes on articles exported. The Court, referring to *Almy* v. *California,* 24 How. 169, holding a stamp tax by a State on bills of lading for gold shipped out of the State unconstitutional, said (p. 294):

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished

indirectly by legislation which accomplishes the same result."

In *Macallen* v. *Massachusetts,* 279 U. S. 620, this statement is quoted and stated to be "the well established rule" (p. 629).

In the *Fairbank* case the Court further said (p. 300):

> "Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In the *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 581, the Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, * * *. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

The principle is fully sustained by the cases cited and analyzed below.

D. ANY INTERFERENCE BY THE FEDERAL GOVERNMENT WITH MATTERS WHICH ARE WITHIN THE STATE'S JURISDICTION IS UNCONSTITUTIONAL IN A TWOFOLD SENSE.

It clearly follows from the principles established above that the right of the States to exercise without interference by the United States, authority over all matters jurisdiction of which is reserved to them, is a fundamental principle of the Constitution.

Any such interference is unconstitutional in a twofold sense: *first,* it exceeds the powers granted the United States by the Constitution; *second,* it violates the rights expressly reserved to the States.

In *Hammer* v. *Dagenhart, supra,* the Court said (p. 276):

> "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

This principle is also recognized in *Veazie Bank v. Fenno,* 8 Wall. 533, 541, where the Court said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

E. APPLICATION OF THESE PRINCIPLES.

The United States can only exercise the powers expressly granted it. In determining what these powers are there is no presumption in favor of a grant of power to the United States; the limitations of the Tenth Amendment reserving all powers not granted to the United States to the States and the people must be given a fair and reasonable construction so as to carry out the purposes and spirit of the Constitution.

Furthermore, to carry out these purposes, neither a State government nor the United States can accomplish by indirection what it can not accomplish directly.

The division of power between the States and the

United States is a fundamental and basic principle of the Constitution. In case of doubt, or in case of an apparent conflict of powers, "a practical construction" must be adopted so that "neither power will nullify or substantially impair the other." This is the principle applied in determining the limits imposed on Congress in the regulation of interstate commerce which is expressed in the principle that only matters which constitute interstate commerce or directly affect interstate commerce are subject to the control of Congress. Action concerned with the normal control of internal affairs, even though they may affect interstate commerce, are held to affect it only indirectly, since otherwise Congress would have power to defeat the purpose of the Constitution which was to leave control of internal affairs to the States.

VII.

THE IMPORTANCE OF THE SYSTEM OF DUAL SOVEREIGNTY UPON WHICH THE CONSTITUTION IS BASED.

Before discussing the particular powers granted the federal government by the Constitution, which the government contends permits this legislation, it is essential to discuss the general principles which are pertinent in this discussion.

A. THE EMBODIMENT OF THIS PRINCIPLE IN THE CONSTITUTION WAS THE NECESSARY RESULT OF THE PREVAILING CONDITIONS.

The fundamental and unique principle of the Constitution is the system of dual sovereignty for which it provides. The formulation of this system made the adoption of the Constitution, possible and is a basic principle in the light of which any interpretation of its meaning must be made.

HISTORICAL REASONS FOR THIS PRINCIPLE.

The principal reasons which resulted in our dual form of government under which the federal government holds and may exercise only certain enumerated powers while to the States and the people are reserved unconditionally all other powers, may be summarized as follows:

A. FEAR OF STRONG CENTRAL GOVERNMENT.

First. The same apprehensions which caused the limitations expressly contained in the first nine amendments, namely, the fear of oppression by a strong central government not subject to local control. The spirit of the New England town meeting was strong. The experience of the colonies with England had implanted the belief that large or unlimited powers in a centralized

government would inevitably lead to the loss of that liberty which they had just attained.*

B. FEAR OF OPPRESSION OF MINORITY STATES BY MAJORITY.

Second. The desire engendered by strong sectional feelings of the colonies to prevent so far as possible oppression of a minority of States by a majority which might be in control of the federal government, since the interests of such majority might be very different from and perhaps hostile to the minority States.

This feeling appeared in the debates at the Constitutional Convention, and is shown in various provisions of the Constitution itself. George Mason, delegate from Virginia, said, "The Southern states are in a minority in both houses. Is it to be expected that they will deliver themselves, bound hand and foot, to the Eastern states and enable them to exclaim, in the words of Cromwell on a certain occasion . . . 'The Lord hath delivered them into our hands'?" (*Debates in the Federal Convention* . . . by James Madison, Hunt & Scott ed., p. 485.)

The South especially feared that the right to regulate foreign commerce would be used to the detriment of the southern agricultural states which were in a minority

*NOTE. "The strong local pride and attachment of citizens to their particular colonies were naturally intensified by the rise in status of those colonies to independent sovereignties. An exhausting war had just been fought for the sole purpose of freeing themselves from the control and tyranny of a higher power having jurisdiction over them. To substitute for that power another superior one, even though of their own making, seemed fraught with heavy risk." (James Truslow Adams, *America's Tragedy*, p. 20.) "As Burke had said, 'the Americans were accustomed to snuff the approach of tyranny in every tainted breeze.' When the east wind ceased to blow, they discovered the same deadly odor in their own westerly. One might safely entrust a quantum of power to one's State government, where the legislators were friends or neighbors; provided elections were frequent and the scope of government limited by a Bill of Rights." (*History of the United States, 1783-1917*—Morison, pp. 38, 39).

and to the advantage of the eastern commercial states. Hence the restrictions that no tax may be laid on articles exported from any State and no preference given to the ports of one State over those of another. To protect against discrimination in taxation by a hostile majority of States, provision was made that no direct taxes may be levied except on the basis of representation by the States and all duties, imports and excises must be uniform. Likewise, for the same purpose the small States were given an equal representation in the Senate with the largest State.

C. FEAR OF INTERFERENCE WITH SLAVERY.

Third. The more southern slave States were unwilling to enter a union which had any power to interfere with slavery.

D. DESIRE FOR LOCAL SELF GOVERNMENT.

Fourth. The belief that local affairs could be best administered locally and that only the minimum of power necessary for the central government should be granted.

For these reasons not only were the powers granted to the federal government limited to matters deemed essential but even these powers were restricted.

Section 9 contains eight restrictions. The first eight amendments by the First Congress adopted pursuant to the understanding on which the Constitution was accepted, consists entirely of restrictions intended to prevent the central government from taking arbitrary and oppressive action. There are other restrictions in the Constitution showing the ever present intent to prevent interference by the central government with matters of local concern, including even the provision that the federal government shall not have complete jurisdiction over forts, magazines, and arsenals situated within the

borders of a State unless purchased with the assent of a State.

Finally, to leave no doubt as to this intent, Amendment IX provides that the enumeration of certain rights shall not be construed "to deny those retained by the people" and the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". This Tenth Amendment did not strip the federal government of any powers granted it by the original Constitution. In this respect, it added nothing to the Constitution. (*United States* v. *Sprague,* 282 U. S. 716, 733; Madison, I *Annals of Congress,* 441.) But it added much in the way of emphasis. It underlined, so to speak, the powers which were reserved and emphasized in an unmistakable manner that the preservation to the states of control over their internal affairs is a vital, fundamental principle of the Constitution, and that it can not be interpreted so as to impair or destroy this exclusive control of the States over their internal affairs without violating its purpose and intent.

B. THE SYSTEM OF DUAL SOVEREIGNTY AND CITIZENSHIP.

A. DUAL SOVEREIGNTY.

President Monroe, describing our dual system, said:

> "There were two separate and independent governments established over our Union, one for local purposes of each State by the people of the State, the other for national purposes over all the States by the people of the United States. The whole power of the people, on the representative principle, is divided between them. The State governments are independent of each other, and to the extent of their

powers are complete sovereignties. The National Government begins where the State governments terminate, except in some instances where there is a concurrent jurisdiction between them. This Government is also, according to the extent of its powers, a complete sovereignty.

. . . . . .

"It is impossible to speak too highly of this system taken in its two fold character and in all its great principles of two governments, completely distinct from and independent of each other, each constitutional, founded by and acting directly on the people, each competent to all its purposes, . . ." (President Monroe's *Views on Internal Improvements* submitted to Congress, May 4, 1822. Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 144-148.)

B. DUAL CITIZENSHIP.

Thus, under the Constitution, we have a dual citizenship. In *United States* v. *Cruikshank,* 92 U. S. 542, 549, the Court said:

"We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."

Each sovereignty is entitled to obedience by the citizens within its constitutional field of power but not outside of that field.

C. DUAL GENERAL WELFARE.

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power (citations), as do the States in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government. . . ." (*Nebbia* v. *New York*, 291 U. S. 502, 524.)

C. THE NECESSITY OF PRESERVING THE SOVEREIGNTY OF THE STATES AND THE CONTROL OF LOCAL MATTERS HAS ALWAYS BEEN RECOGNIGED BY THIS COURT.

In *Texas* v. *White*, 7 Wall. 700, 725, the Court said:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *Lane County* v. *Oregon*, 7 Wall. 71, 76, the Court said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States * * * * * *."

In *The Collector* v. *Day,* 11 Wall. 113, 124, 125, where the power of the United States to tax the salary of an officer of a State was involved, the Court said:

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States. * * * * *
>
> "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. * * * * *
>
> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, * * * * * "

In *Hammer* v. *Dagenhart, supra,* at p. 275, the Court said:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."

In *Twining* v. *New Jersey,* 211 U. S. 78, 92, the Court said, with reference to the Fourteenth Amendment, that

it limited the powers of the States and therefore it was the duty of the Court to enforce such limitations, but it added:

> "But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union."

D. REASONS FOR DIVISION OF JURISDICTION STILL VITALLY IMPORTANT.

As the Constitution clearly provides that the preservation of the rights and jurisdiction over internal affairs reserved to the States is a fundamental principle of the Constitution, only an amendment can authorize any impairment of these reserved rights.

It may be well, however, briefly to show the importance and vitality of this principle at the present time.

During the last few years, it has been urged that the federal government should have authority to control such matters reserved to the States as the federal government decides it can deal with more effectively than the States. When local conditions seem chaotic, it is natural to seek aid elsewhere. This danger was emphasized by Chief Justice Taft in the *Child Labor Tax Case,* 259 U. S. 20, 37, where he said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an

insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. *In the maintenance of local selfgovernment, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.*" (Italics ours.)

Woodrow Wilson in his *Constitutional Government in the United States,* says:

"Uniform regulation of the economic conditions of a vast territory and a various people like the United States would be mischievous, if not impossible. The statesmanship which really attempts it is premature and unwise. (p. 179.) * * * *

"It is this spontaneity and variety, this independent and irrepressible life of its communities, that has given our system its extraordinary elasticity, which has preserved it from the paralysis which has sooner or later fallen upon every people who have looked to their central government to patronize and nurture them. (pp. 182-183.)

"It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor and certainty to the processes of our economic and political growth. *To buy temporary ease and convenience for the performance of a few great tasks of the hour,*

at the expense of that would be to pay too great a price and to cheat all generations for the sake of one.'' (pp. 191-192.) (Italics ours.)

Mr. Justice Brandeis said in *New State Ice Co. v. Liebmann,* 285 U. S., 262, 311,

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*

The North Dakota legislation which came before the Supreme Court in *Green v. Frazier,* 253 U. S. 233, was a social experiment which turned out disastrously, but the unfortunate consequences were largely localized. Had the experiment been tried on a national scale, it would have resulted in a national disaster.

William Jennings Bryan said with respect to extending the national powers,

> "Not only would national legislators lack the time necessary for investigation, and therefore lack the information necessary to wise decision, but the indifference of representatives in one part of the country to local matters in other parts of the country would invite the abuse of power. Then, too, the seat of government would be so far from the

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*NOTE. Chief Justice Taft said, "There is a great advantage in having different State governments try different experiments in the enactment of laws and in governmental policies, so that a State less prone to accept novel and untried remedies may await their development by States more enterprising and more courageous. The end is that the division of opinion in State governments enforces a wise deliberation and creates a *locus poenitentiae* which may constitute the salvation of the Republic." (*Popular Government,* p. 155.)

great majority of the voters as to prevent the scrutiny of public conduct which is essential to clean and honest government. The union of the separate states under a central government offers the only plan that can adapt itself to indefinite extension." (*Central Law Journal*, 1908, p. 273, quoted in *Thompson, Federal Centralization*, p. 364.)

VIII.

REGULATION OF AGRICULTURE IS SOLELY A MATTER OF STATE JURISDICTION

This proposition needs little argument. Agriculture is essentially local. There is no power granted the federal government which can by any possibility be construed to give Congress any control over it.

The most important matters within the control of the States are local government, education, police, agriculture, manufacturing, and mining, and the general health and the safety of the citizens of the State, and other similar matters falling within the police power. This Court in *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, said that manufacturing is a local business and added:

> "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

Agriculture is even more intrinsically local than manufacture as the latter may require the transportation, in interstate commerce, of the supplies and raw materials to be manufactured as well as the shipment in interstate commerce of the manufactured articles. But in the case of agriculture, commerce does not begin and can not begin or be affected until such products are produced and harvested. See *Schechter* v. *United States, supra; Kidd* v. *Pearson,* 128 U. S. 1; *Industrial Asso.* v. *United States,* 268 U. S. 64, 82.

IX.

POWERS GRANTED THE UNITED STATES BY THE CONSTITUTION WHICH THE UNITED STATES CONTENDS JUSTIFY THIS LEGISLATION.

The United States contends that the power to regulate agriculture in the manner attempted by this legislation is conferred by the Constitution.

First. Under the power to tax for the general welfare of the United States.

Second. By reason of the right of the United States to carry out its fiscal policies.

The contention is not made that the interstate commerce clause justifies this legislation. However, since the District Court based its decision on the interstate commerce clause, we shall consider the application of this clause briefly, especially as such consideration will tend to clarify the issues in this case.

X.

THE INTERSTATE COMMERCE CLAUSE DOES NOT JUSTIFY THE PRESENT LEGISLATION.

Agriculture is intrinsically a local matter and not subject to control by Congress (*supra*, p. 66).

The growing of crops is obviously not commerce, nor is it an instrumentality of commerce like a railroad. The growing of crops affects the amount of interstate commerce in such commodities. But it is abundantly established that reduction or increase in the growing of crops, the manufacture of commodities, or the mining of minerals, even though such crops, commodities, or minerals are intended for shipment in interstate commerce, is not itself interstate commerce and, therefore, not subject to federal control.

It is, of course, true that an act though seemingly wholly disconnected with interstate commerce may become unlawful if done as part of a scheme to restrict interstate commerce. In such case the direct purpose of the act being to regulate interstate commerce, it can properly be regarded as directly affecting and, therefore, be subject to control by Congress.

Where, however, the act in question is merely normal action respecting a matter wholly internal to the States, then, although it may affect interstate commerce, such effect is clearly held to be indirect and not subject to the control of Congress.

Thus, a State may prohibit the manufacture of liquor because it deems such manufacture against its public policy although the effect is to completely prevent interstate commerce in such liquor. To hold otherwise the result would be as stated in *Kidd* v. *Pearson*, 128 U. S. 1, 21,

"that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?"

Thus, although a certain action may seriously affect interstate commerce, it is not for this reason subject to federal control. If the action deals with a local matter and is not part of an unlawful plan to restrict interstate commerce, its effect on interstate commerce is held to be indirect and not subject to Congressional control.

In *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, it was held that a conspiracy to suppress local building operations solely for the purpose of compelling employment of union labor is not a conspiracy to restrict interstate commerce merely because it curtails the sale and shipment of materials in interstate commerce. The Court said (p. 107),

"*Use* of the materials was purely a local matter and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."

In *Industrial Association* v. *U. S.*, 268 U. S. 64, it was held that a combination to establish the open shop plan of

employment by requiring builders who desired building materials of certain kinds to obtain permits, did not violate the Sherman Anti-Trust Act. The Court said (p. 82),

> "The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing, or growing crops—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the present case we have a purely local situation. Farmers were merely exercising their normal right to grow crops which, after they were harvested, might be shipped in interstate commerce. There was no intent or plan to obstruct interstate commerce.

Congress by the present legislation was not even attempting to remove any obstruction to interstate commerce. If there is any such obstruction it has been created by the Secretary of Agriculture in inducing the farmers to enter into a combination to restrict their crops in order to obtain higher prices and thus to restrict the amount of crops shipped in interstate commerce and the prices received therefor.

It is clear, therefore, that the commerce clause affords no justification for the present legislation.

XI.

THE THREE DIFFERENT INTERPRETATIONS OF THE GENERAL WELFARE CLAUSE.

Congress is given authority—

> "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The Government in its discussion of this so-called welfare clause contends that even though Congress has not the power to regulate agriculture by direct legislation, and therefore directly to put its desired plan into effect, nevertheless it can under this so-called welfare clause impose taxes to be paid to farmers to induce them to conform to its scheme.

We contend that under no interpretation of the welfare clause which has so far received any support can Congress so tax for the express purpose of applying the money on such conditions as to effect a regulation of agriculture.

THE THREE INTERPRETATIONS OF THE WELFARE CLAUSE.

Three interpretations of this clause have been advanced:

1. That it constitutes two separate grants of power: *first,* the power to tax; and *second,* as a wholly separate power, the power to legislate in any manner Congress deems appropriate for the general welfare of the United States.

2. That Congress is authorized to tax for all matters which concern the general welfare of the United States, the United States being the political body created by the Constitution and the general welfare for which it may

tax being the matters which have been confided to its charge and for which it is responsible, and not matters for which by the express provisions of the Constitution it has no responsibility under the Constitution or the right to exercise any authority. In other words, under this interpretation the power to tax was given Congress in order to enable it to carry out its authorized powers and therefore taxes can be levied only for the purposes comprised within its enumerated powers. This view was strongly held by Madison and is hereafter referred to as the Madisonian interpretation.

3. The third view, on which the Government relies, which was sponsored by Hamilton, and is hereafter referred to as the Hamiltonian interpretation, is that the clause authorizes Congress to tax not only to enable the United States to appropriate money to carry out the powers and responsibilities conferred on it by the Constitution but also to appropriate money for other objects which concern the general welfare of the people of the United States although Congress has no power to legislate as to or control such matters.

VIEW THAT THE WELFARE CLAUSE GIVES INDEPENDENT POWER TO LEGISLATE AS TO ALL MATTERS OF GENERAL WELFARE.

The first interpretation, namely, that the clause should be read as giving, first, the power to tax and, second, an independent power to legislate for the general welfare of the people of the United States including in the phrase "general welfare" matters not embraced within the enumerated powers has never been very seriously advanced and is now generally rejected, and we believe needs no further consideration. The government admits this interpretation is inadmissable.

If so construed as an independent, substantive grant of power, it would render wholly unimportant and unnecessary the subsequent enumeration of specific powers and would create a general authority in Congress to pass all laws which Congress may deem for the general welfare. As stated by Judge Story, "under this interpretation, the Constitution would practically create an unlimited national government" (Story *Commentatives on the Constitution,* 5th Ed., Sec. 909). It is well established that Congress has no such authority.

THE GOVERNMENT'S CONTENTION IS BASED ON THE HAMILTONIAN INTERPRETATION OF THE WELFARE CLAUSE.

The Government bases its contention on the Hamiltonian interpretation of the welfare clause, viz.: that although the United States has no power or right to legislate with respect to or regulate matters not included within its enumerated powers, it, nevertheless, may appropriate and apply tax moneys to other matters not embraced within the enumerated powers, which matters it can not control or regulate. It contends that in the present case we have a mere appropriation of money for the benefit of agriculture, and that this legislation constitutes no control or regulation of agriculture. It bases its position on the contention that in making an appropriation Congress can specify the objects to which the money is to be applied; that in the present case Congress merely specifies that the benefits shall be paid to those farmers who agree to conform to and carry out its scheme to restrict agriculture; that it does not compel any farmer to conform so that no direct regulation is exercised, and that, therefore, the legislation merely amounts to an appropriation of money.

WE CONTEND THAT THE MADISONIAN INTERPRETATION OF THE WELFARE CLAUSE IS CORRECT, BUT THAT NEITHER THE MADISONIAN NOR THE HAMILTONIAN INTERPRETATION JUSTIFIES THE PRESENT LEGISLATION.

We submit that the Madisonian interpretation of the welfare clause is correct. If so, since Congress is given no power to control agriculture, no tax can be levied for the purpose of paying the proceeds to farmers to benefit agriculture.

We further confidently submit that if the Hamiltonian interpretation of the welfare clause is adopted, it clearly does not justify the present legislation which directly effects and is intended to effect a regulation of agriculture.

We propose to discuss both the Madisonian theory and the Hamiltonian theory as to the interpretation of the general welfare clause.

The meaning and scope of this clause has never been interpreted by this court. In *United States* v. *Realty Co.*, 163 U. S. 427, the court said, of this question:

> "The question is one of the greatest importance. It should not be decided without very mature investigation and deliberation. . . ."

This lack of judicial interpretation and the importance of the question is our excuse for the extended discussion which follows.

XII.

MADISON'S INTERPRETATION OF THE WELFARE CLAUSE SHOULD BE ACCEPTED.

We submit that the Madisonian interpretation of the welfare clause—namely, that Congress is only authorized to levy taxes to be used with respect to matters within the federal field of power—is correct. If so, it follows, necessarily, that power to control agriculture not having been conferred on Congress, the regulation and control of agriculture—as, in the present case, by the Agricultural Adjustment Act—is not one of the purposes for which taxes can be constitutionally levied.

1. THE SITUATION AT THE TIME OF THE ADOPTION OF THE CONSTITUTION SHOWS NO POWERS NOT ESSENTIAL GRANTED THE UNITED STATES.

The Articles of Confederation which created "The United States of America", proposed in 1777 and finally ratified by the requisite number of states in 1781, granted insufficient power to create a real nation.

The purported rights granted Congress were sufficient in many respects but the Federal Government lacked all powers to function efficiently, since for practical purposes it could enforce its will in the matters confided to it only with the consent of the states and its only means of raising revenue to carry out its purposes was by requisitions on the states which they refused to comply with. Its authority was therefore flouted and it was helpless and held in general contempt.

Washington wrote to Jay in 1786,

> "I do not conceive we can exist long as a nation without having lodged somewhere a power which will pervade the whole union in as energetic a manner, as the authority of the States Governments extends

> over the several States. . . . Requisitions are a perfect nullity, where thirteen sovereign, independent, disunited States are in the habit of discussing and refusing compliance with them at their option. Requisitions are little better than a jest and a byeword throughout the land. If you tell the Legislature that they have violated the treaty of peace and invaded the prerogatives of the Confederacy, they will laugh in your face." (Letter of Washington to Jay, August 1, 1786, Charles Warren, *Making of the Constitution*, pp. 17-18 and cf. *The Federalist*, No. XV.)

Neither the United States nor the States had credit. Business was in a collapse. Shay's Rebellion brought fears of revolution and the possible alternatives of complete disorder or a strong monarchial government.

It was deemed essential by the thoughtful and the business interests that the United States be given direct power to fulfill its functions—to deal with foreign nations, to defend the country against attack, to control foreign trade so that it could exact trade agreements with England and other commercial nations, and to insure harmony among the States by controlling interstate relations. The right to enforce its powers in these respects and to enforce by direct action the collection of taxes necessary for these purposes was deemed essential.

On the other hand, there was a strong reluctance to grant power to any authority other than the individual States and local government units.

Mr. Justice Story in his *Commentaries* says,

> "That which strikes us with most force is the unceasing jealousy and watchfulness everywhere betrayed in respect to the powers to be confided to the General Government. For this several causes may be assigned. The Colonies had been long engaged in struggles against the superintending authority of the

Crown and had practically felt the inconvenience of the restricted legislation of the parent country. These struggles had naturally led to a general feeling of resistance to all external authority; and these differences to extreme doubts, if not to dread of any legislation, not exclusively originating in their domestic assemblies." (*Commentaries on the Constitution*, 5th Ed., Vol. 1, p. 173.)

See also *supra* pp. 54-57.

Great jealousy also existed among the States and a very grave fear that the States might be oppressed by a central government controlled by a hostile majority of the States, or a majority whose interests differed from those of the minority.

John Dickinson of Delaware said to Madison,

"... We would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large states." (Charles Warren, *The Making of the Constitution*, p. 218.)

This fear of domination by a majority of States whose interests were different was due to the vital social and economic differences existing among the States.

"Virginia was much more unlike Massachusetts than Massachusetts was unlike England. The Carolinas, with their lumber and forests and their rice fields felt themselves utterly unlike Virginia; and the Middle states, with their mixture of population out of many lands, were unlike both New England and the South." (Woodrow Wilson, *Constitutional Government in the United States*, p. 45.)

There were also the differences between the slave States and the free States; the more southern States were de-

termined that slavery should not be interfered with by the central government. Commercial interests differed greatly; the southern States were almost entirely dependent upon their exports of tobacco, rice, and indigo, while Massachusetts and the other New England States were dependent upon the carrying trade and the fisheries.

Furthermore, the States feared taxation by any authority other than the local government as the abuse of the power of taxation had been one of the motivating causes of the Revolution.

The Constitution was a compromise between these conflicting points of view. The provisions of the Constitution therefore protected a minority of the States against the oppression of a hostile majority so far as this was possible. An attempt was made to limit the powers actually granted the federal government against abuse, by various restrictions, and by the first ten amendments, which were adopted in accordance with the understanding on which the Constitution was accepted.

One thing seems clear—that no important powers were intended to be granted the United States which were not deemed necessary to the accomplishment of the main purposes in view. It was doubtful if the Constitution would be adopted even if these powers were granted. Certainly, it was far from any intention of the members of the Convention to increase the risk of rejection by including any important grants of power which were not deemed essential.

2. MADISON'S DOCTRINE IN ACCORD WITH FUNDAMENTAL PRINCIPLES.

(a) Under dual system, provision for welfare divided between state and federal governments.

A government is organized to provide for the general welfare of its citizens. The function of a single unitary government is to provide for the welfare of its citizens in all respects in which it is proper for a government to act.

Under our system of dual governments, we have two sovereignties acting on the same individuals.

> ". . . and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other." (*United States* v. *Cruikshank*, 92 U. S. 542, 549.)
>
> * * *
>
> ". . . The power to promote the general welfare is inherent in government. Touching matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacities, touching all subjects jurisdiction of which is not surrendered to the federal government." (*Nebbia* v. *New York*, 291 U. S. 502, 524.)

(b) Division of powers marks division of responsibility.

Responsibility for the general welfare of the people living in the territory comprised within the United States is thus divided. That concerned with matters over which the United States has the right and duty to control is the general welfare of the United States. That in respect to matters which the States have the right and duty to control is the general welfare of the States.

(c) "United States" designates the political body.

When the Constitution gave the United States authority to levy taxes to provide for the "general welfare of the United States" it seems clear that this general welfare related solely to matters with which the United States as a political body had the right and duty to deal.

Taxes may be levied "to pay the debts and to provide for the common defence and general welfare of the United States". It is the debts of the United States as a political body which are to be paid, not the debts of the people of the United States; it is the common defense in war which is to be provided for, and since only the United States can declare and engage in war, it is necessarily the common defense of the United States, as distinguished from the States, which is intended. It is the general welfare of the United States as a political body which is to be provided for, so that thereby the people under its protection will be benefitted in their federal relations—as citizens of the United States and not in any other capacity or status.*

(d) General design to "promote general welfare" was to be through exercise of delegated power.

The Constitution in its preamble recites that it is established to "promote the general welfare". It must be presumed that this purpose of promoting the general welfare was, for the purposes of the Constitution, to be fully accomplished by conferring on the United States the enumerated powers set forth in the Constitution,

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**Note.* An examination of the Constitution shows over forty instances where the words "United States" or "United States of America" are used to designate the body politic. In a few cases the words refer to the territory under the jurisdiction of the federal government. In no case do the words mean—"people of the United States." In the Preamble, the "people of the United States"—the creative power—are distinguished from the "United States of America"—the created body politic.

leaving the control of other matters with the States. It follows that the general welfare of the United States is the general welfare touching matters, power over which was confided to the United States. If we hold that there are matters of general welfare of the United States which the United States is not authorized to control, but for which it can only apply money, we reach the absurd result that a constitution expressly framed to promote the general welfare did not give Congress any direct power to promote it with respect to certain matters.

This view is strengthened by other considerations.

(e) Taxing power normally auxiliary to regulatory power, and this is reasonable.

In the first place, the taxing power would normally and naturally be given for the purpose of carrying out those matters with which the government was authorized to deal. The government of the United States and the government of the States are similar to the multiple "districts" or organs of local government set up in some of our States. For example, the same people and the same territory may be organized locally into a municipality, a school district, and a fire district, each having control of its own functions and each having the taxing power. It would take very strong, explicit language in the governing statutes to convince one that the school district was empowered to tax and apply the money to the purchase of fire apparatus to be controlled by the fire district, or for the payment of salaries of policemen controlled by the municipality. Yet the situation is the same here. The United States has no duty or authority, except in connection with its powers. It would be wholly unnatural to give it power to tax for objects over which another sovereignty has the exclusive responsibility and authority. It is impossible to answer John Randolph

Tucker's questions

> "That a government should have this great means to execute powers of other governments reaches the point of absurdity. Why should a government be given means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution?" (*Constitution of the United States,* p. 480),

The same rule applies to private corporations. A corporation authorized to engage in the cotton manufacturing business can not raise and employ its funds in a mining enterprise, which business it was not allowed to conduct, on the plea that it is permitted to raise funds for its general welfare and that success in the mining business would promote its general welfare and that of its members.

(f) Power to appropriate is an implied power auxiliary to the vested powers.

The Hamiltonians neglect, in their discussion, the fact that this clause is a clause authorizing the levying of taxes; that is the object sought. The words "to pay the debts and provide for the common defence and general welfare of the United States" are only a restriction, as Story himself points out, a statement of the purposes for which taxes may be raised. The Hamiltonians, however, when they come to interpret the clause, read it as granting the power to tax and the further right to appropriate the proceeds for these purposes. But the clause does not say so. Nowhere in the Constitution is any ex-

press power to appropriate provided for. It is an implied right which accompanies each power granted so far as necessary as a means of executing the power. Here we have a power to tax. There is an implied right to appropriate money for the expense of collecting the tax. There is no implied right given by a taxing section to appropriate money for any other purpose. In other words, the only right to appropriate given by the Constitution is implied,—the right to appropriate as a means of carrying out a power. But since the only power given by this section is the power to tax, there is no implied right to apply money to agriculture, but only to the collection of taxes. Had such a right been intended, it would have been granted as an express power—the power to appropriate for these purposes. It seems clear that the "general welfare" as here used was not intended to include matters beyond the scope of the enumerated powers, so that it was not necessary to grant the power to appropriate for the "general welfare" since that right, to the extent intended, was covered by the implied right to appropriate for the purpose of carrying out the granted powers.

(g) Only explicit language would justify accepting Hamiltonian view.

It would take very clear and explicit language to convince one that language in a constitution giving the authority to tax authorizes a sovereignty to tax for purposes which, by the terms of the same instrument, are confided to another sovereignty. In other words the language would have to be so explicit as to permit of no other interpretation.

But here we have no such clear, explicit language. On the contrary, we submit that the language clearly shows that no such right was intended. The language surely is

not sufficiently clear and explicit to require the meaning contended for. If it were, this dispute as to its meaning would not have arisen.

(h) Opinion of Chief Justice Marshall.

This view is supported in clear language by Chief Justice Marshall. In *Gibbons* v. *Ogden,* 9 Wheat. 199, he said that—

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

In this case Marshall holds that though the State and the United States can tax the same subject, they are exercising different powers because each taxes for the objects confided to it and neither one can tax for the powers confided to the other. If this is so, it is clear that the United States can not tax for the purpose of accomplishing an object over which the States have exclusive jurisdiction, as in the case of agriculture.

3. IT IS INCONCEIVABLE THAT THE CONVENTION SHOULD HAVE GIVEN THE FEDERAL GOVERNMENT POWER TO RAISE MONEY TO PROVIDE FOR MATTERS WITH RESPECT TO WHICH THE STATES RETAINED THE POWER TO TAX AND OVER WHICH THEY INSISTED ON KEEPING CONTROL.

As we have shown, the Constitution, especially in matters of taxation, was intended to confer only such power on the central government as was essential to enable it to perform its functions. Power to raise money to be applied to purposes which the States had the acknowledged authority to provide for and the exclusive power to control was certainly not essential.

It must be remembered that at the time of the adoption of the Constitution people had little confidence in the central government; they feared its power and

doubted if it would not be controlled by a hostile majority from other States. The population of each State was comparatively small. The citizens of each State could trust their friends and neighbors to care for their local interests; they could not trust a body, a majority of which was composed of citizens of other States. They were reluctant to give such a body any power. For what conceivable reason would they wish to give it the power to tax them in order to provide for local matters over which they insisted on retaining control and for which they retained the right to raise money by taxation?

4. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE PUBLIC POLICIES WHICH THE STATES HAVE THE RIGHT AND DUTY TO DECLARE AND ENFORCE.

(a) Regulation through spending an invasion of State power.

Of course, if the right to appropriate money for matters concerned with the internal affairs of the State could be used, as it is used in the present case, to restrain and drastically interfere with and control an important local matter, it would be wholly repugnant to the fundamental principle of the Constitution, as we shall show in our discussion of the Hamiltonian view of the welfare clause.

But even if the right to appropriate money for intrastate objects is held not to authorize such a plan to restrain or regulate local matters, it would nevertheless affect the carrying out of the public policy of the States.

(b) Enlargement of federal taxing purposes a burden on State taxing power.

The resources subject to taxation are not unlimited. All taxes whether raised by the United States or by the States must be paid by the people of the United States. Even if larger taxes can be raised, it is not always politic to do so; nor can it necessarily be done without impos-

ing oppressive burdens. If the United States raises money to apply to local purposes, there is that much less that the States can raise wisely or without too much hardship. Unless, therefore, the United States applies the money to the purposes to which the States wish it to be applied, they are necessarily thwarted to this extent in carrying out the purposes they wish to accomplish.

(c) Burden on State taxing power impairs State's ability to provide for welfare of its citizens.

Thus, Massachusetts might wish to devote money to encouraging manufactures, while the United States might apply it to education or vice versa. Since the amount of money available is limited, if it is applied to education, manufacturing, which at the time seemed more important to Massachusetts, would suffer. Thus, the policy of the State would necessarily be affected and thwarted.

Indeed, the United States could apply the money to undo some policy which the State had promoted, since, by declining to apply the proceeds to a project which the State had fostered and applying it to some contrary policy, what the State had accomplished would be undone.

(d) Enlargement of federal taxing purposes opens door to sectional discrimination.

In any event, the United States would not be likely to agree with each State on what was the wisest policy for the expenditure of the money in that State. It would be apt to apply general policies while the States would apply local policies suited to their own needs. If the United States were always to agree with each State, as to the wisest application of tax money in that State to local purposes, why should it wish or need the right to appropriate the money for the purpose, since the State it-

self could so raise and apply the money? The only reason would seem to be that with this power money could be raised largely in certain States or in a certain section to be spent for the welfare of other States or sections. But, if there is one thing clear in the history of the formulation and adoption of the Constitution, it is that those who formulated and those who adopted it had no such intention, and had they dreamed that the Constitution provided that taxes raised in one section of the country could be applied largely in another section of the country for local matters outside the powers granted the United States, the Constitution would have failed of adoption.

5. IF THE GENERAL WELFARE CLAUSE HAD BEEN DESIGNED TO ENLARGE THE TAXING POWER, A SIMILAR CLAUSE WOULD HAVE BEEN APPENDED TO THE BORROWING POWER.

Immediately following the clause in Article I, Section 8, permitting Congress to levy taxes, is the power "to borrow money on the credit of the United States". Under the Hamiltonian view, it is the provision that taxes may be levied "to provide for the general welfare of the United States" which gives Congress the power to raise money by taxation for purposes outside the sphere of federal control. But the borrowing power does not contain the words "to provide for the general welfare." Therefore, if the Hamiltonians are correct in their contention that the phrase "to provide for the general welfare of the United States" enlarges the purposes for which taxes may be levied, it would seem to follow that Congress did not have the right to borrow money for such enlarged purposes. If so, the result would follow that taxes could be levied for these enlarged purposes but money could not be borrowed for them. Such a result would be irrational.

It seems clear that if the Convention had intended to confer a sweeping power of expending money outside of the sphere of federal control, they would not have confined it to the taxing power. The delegates would have inserted a separate power, namely, the power to appropriate money whether derived from loans, or taxes to carry into execution the powers vested in the government of the United States, and, in other respects to promote the general interests of the people of the United States.

They would have made it clear that Congress could go outside the sphere of federal power in spending money, in the first place, and, in the second place, they would not have inserted the provision simply as an annex to the taxing clause but would have made it apply to revenue from all sources.

6. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE EXPRESS RESTRICTIONS ON TAXATION IMPOSED IN THE CONSTITUTION.

The power to tax was a power which the people of the States were most reluctant to confer on Congress. They did so only because it had been proved that the United States under the Articles of Confederation was impotent without this power.

They restricted the power in every way they could to prevent its being used by a majority of States to oppress a minority and still give the requisite ability to raise money.

Charles C. Pinckney, Member of the Convention, said in the South Carolina House of Representatives, in January 1788,

> "We had many things to hope for from the National Government and the chief thing we had to fear from such a Government was the Risque of un-

equal or heavy taxation. . . ." (Max Farrand, *Records of the Federal Convention, Vol.* III, 83, *North Carolina State Records,* XX, pp. 777, 779.)

Thus, due to the fear that the northern and middle States, whose exports were comparatively small compared with the southern agricultural States, might levy excessive taxes upon exports of tobacco, rice and indigo, and thus oppress the southern States, it was provided that Congress should have no authority to tax exports. To provide so far as possible against imposing taxes which would be disproportionately burdensome to one section, it was provided that no direct taxes could be levied except on the basis of representation and that all duties, imposts, and excises must be uniform.

But these purposes would be defeated if the United States could levy taxes which were uniform or based on representation and apply the proceeds to local affairs as it saw fit. Even if the subject matter to which the money was applied was of a general character, it would obviously be possible to apply it so as to benefit some of the States disproportionately. Benefits applied to manufacturing would not have aided the South. Benefits applied to tobacco or rice would not have aided the North.

Had it been believed that any such power was granted, the Constitution would not have been adopted. In any event, it is clear that restrictions to prevent abuse similar to those imposed on taxation would have been imposed on the expenditure.

This objection to interpreting the clause as the Hamiltonians demand, is so cogently stated by Williamson, a member of the committee which drafted and reported the welfare clause in the Constitutional Convention, and a member of the first two Congresses, at the debate on the Codfisheries Bill in 1792, that we quote it at substantial

length. The Codfisheries Bill proposed what its supporters contended was only a drawback of duties. Williamson contended that the drawback would exceed the duties and would therefore be a bounty. He said:

> "Is it within the powers of this Congress to grant bounties? I think not; and on this single position I would rest the argument.
>
> "In the constitution of this Government there are two or three remarkable provisions, which seem to be in point. It is provided, that direct taxes shall be apportioned among the several States according to their respective numbers. It is also provided, that all duties, imposts, and excises, shall be uniform throughout the United States; and it is provided, that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another. The clear and obvious intention of the articles mentioned was, that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another. It appeared possible, and not very improbable that the time might come, when, by greater cohesion, by more unanimity, by more address, the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people. To prevent the possibility of such a combination, the articles that I have mentioned were inserted in the Constitution. . . .
>
> "But we have been told, that Congress may give bounties for useful purposes; that is to say, they may give bounties for all imaginable purposes; because the same majority that votes the bounty will not fail to call the purpose a good one. Establish the doctrine of bounties, and let us see what may follow. Uniform taxes are laid to raise money, and that

money is distributed—not uniformly; the whole of it may be given to the people in one end of the Union. Could we say in such a case that the tax had been uniform? I think not. There is certainly a majority in this House who think that the nation would be stronger and more independent, if all our labor was performed by free men. This object might be promoted by a bounty. Let a poll-tax be laid, according to the Constitution, of one dollar per poll: in this case sixty cents must be paid for each slave; and the number of slaves being 680,186, their tax would amount to $334,911. To encourage the labor of citizens, let Congress then give an annual bounty of one dollar to every free man who is a mechanic, or who labors in the field. We might be told that the bounty was small, and the object was good; but the measure would be most oppressive, for it would be a clear tax of rather more than three hundred thousand dollars on the Southern States.

"Perhaps the case I have put is too strong—Congress can never do a thing that is so palpably unjust—but this, sir, is the very mark at which the theory of bounties seems to point. The certain operation of that measure is the oppression of the Southern States, by superior numbers in the Northern interest. This was to be feared at the formation of this Government, and you find many articles in the Constitution besides those I have quoted, which were certainly intended to guard us against the dangerous bias of interest, and the power of numbers. Wherefore was it provided that no duty should be laid on exports? Was it not to defend the great staples of the Southern States—tobacco, rice, and indigo—from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes?

"I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it. Establish the general doctrine of bounties, and all the provisions I have mentioned become useless. They vanish into air, and like the baseless fabric of a vision, leave not a trace behind. The common defence and general welfare, in the hands of a good politician, may supercede every part of our Constitution, and leave us in the hands of time and chance.

". . . Establish the doctrine of bounties, set aside that part of the Constitution which requires equal taxes and demands similar distributions, destroy this barrier, and it is not a few fishermen that will enter, claiming ten or twelve thousand dollars, but all manner of persons—people of every trade and occupation—may enter at the breach, until they have eaten up the bread of our children." (*Annals of Congress,* Second Congress, pp. 378, 379, 380, 381.)

7. THE WORDS "OF THE UNITED STATES" EMPHASIZE DISTINCTION BETWEEN OBJECTS OF FEDERAL AND OBJECTS OF STATE WELFARE-CONTROL; THE "SURPLUSAGE" CONTENTION IS UNFOUNDED.

The Government in its brief quotes the argument of Mr. Justice Story to the effect that the phrase would be robbed of any meaning unless given the effect contended for and also quotes Chief Justice Taney to the effect that no words in the Constitution can be rejected as superfluous.

Whatever the effect of the rejection of a single word, it is clear that certain provisions and phrases could be rejected without changing the meaning of the Constitution. They are recited for clarity and emphasis.

Thus, the Tenth Amendment did not change the Constitution or detract from the powers granted Congress. (See *supra* p. 57.) The last clause of Article I, Sec-

tion 8, permitting Congress to make laws necessary and proper for carrying into execution the powers vested by the Constitution in the United States, is intended for clarity and to prevent any contention to the contrary. The same construction would have been given the Constitution without it. (See Hamilton in *Federalist,* No. XXXIII.)

In the taxing clause, also, there are these words adding emphasis and clarity. Had Congress in the original draft of the Constitution merely been given power to tax, it would have been implied that the power was limited to taxing in aid of and in order to accomplish the powers granted to the United States. It was clear that without the words "to pay the debts and to provide for the common defence", Congress would have had power in such case to tax for these purposes. They add nothing but clarity. So, in the case of the additional words "for the general welfare of the United States", they show clearly that the taxes were to be levied for the general welfare of the United States as distinguished from the general welfare of the States.

The important change effected from the Articles of Confederation was from the right to make requisitions on States, which could not be enforced, to the power to lay taxes on individuals, which could be enforced,—as a means of raising revenue. There was no change as to amount which—theoretically at least—might be raised. In each case it was unlimited within the sphere of federal purposes. The words "common defence" and "general welfare," in both instruments, designated the collective federal purposes. The phrase "of the United States" renders emphatic the limitation to such federal purposes.

We submit that Mr. Justice Story's contention discloses the weakness of his case. It is a labored, unconvincing argument.

8. THE PURPOSES SOUGHT TO BE ACCOMPLISHED BY THE CONSTITUTION DID NOT REQUIRE, FOR THEIR ACCOMPLISHMENT THAT THE FEDERAL GOVERNMENT BE GIVEN POWER TO APPLY MONEY IN A FIELD NOT CONTROLLED BY IT, BUT RESERVED TO THE STATES.

In the period from the formulation of the Articles of Confederation until the adoption of the Constitution, there is contained in the letters of the leading statesmen, in the debates in the Convention itself, in the debates in the state conventions at which the Constitution was adopted and in the *Federalist,* a minute and complete discussion of the defects of the Confederation, the purposes to be accomplished by the new Constitution, and a statement of the powers granted by it and the objections thereto.

The student will not find a single reference by any responsible person to the necessity or desirability of giving Congress the power to tax for purposes beyond the scope of the matters which it was given power to control. Yet, this is a vast and important power, and one which surely would have been pointed out and discussed, had there been any intention of granting it.

The *Federalist* written principally by Hamilton and Madison discusses at length the purposes sought to be accomplished by the new Constitution, analyzes all of its provisions of any importance, and gives the reason for their necessity, and answers the objections made thereto. Yet, there is not a suggestion that the right now contended for was a desired objective or that it was provided for. The opposite is clearly implied.

"The opinion of the Federalist," said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 418,

"has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."

In *Federalist* No. XVI, Hamilton discusses the necessity for giving the federal government the right to act directly in enforcing its powers rather than through the state governments. In No. XVII, he meets the objection that this power will tend to render the central government too powerful and to enable it to absorb the power of the States. He first says that the regulation of the domestic affairs of the government would not be attempted. He adds,

"The administration of private justice between the citizens of the same state, *the supervision of agriculture and of other concerns of a similar nature,* —all these things, in short, which are proper to be provided for by local legislation—can never be desirable cares of a general jurisdiction." (Italics ours.)

Clearly, the implication is that supervision over agriculture and other similar local matters not only is not a proper function of the federal government but that it would not be a desirable care of the federal government, or one with which it would desire to concern itself.

Again in No. XXXIV Hamilton specifically designates "the encouragement of agriculture and manufactures" as among "the objects of state expenditures." If this is so, why provide the federal government with power to tax the citizens for the purpose of applying money to these matters?

In considering the defects of the Confederation and the requirements of a stronger government, it is not suggested that the power to apply money to the local affairs of the States is desirable or necessary.

In discussing the power of taxation, Hamilton says in No. XXXI,

> "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people."

It is clear that non-federal purposes were not committed to the care of the United States. It is also clear that the application of money would, necessarily, to some extent, affect and hamper the carrying out by the States of their public policies, as we have shown above. Thus, if Hamilton's statement is correct, the Federal Government should have power to tax and apply the money to the objects committed to its care, and the State governments power to tax and apply the money to the objects reserved for their care; and further, the Federal Government should not have the right to tax and apply the proceeds to objects reserved to the care of the States, or the States, power to tax for Federal purposes. If the Federal Government could tax for State purposes, the exercise of the power would necessarily interfere with the exclusive power of the States to deal with their own affairs, and in consequence the States would not (to quote Hamilton's words) be "free from any other control" but a regard for the public good.

No. XLI, written by Madison, deals with the question of whether any of the powers transferred to the Federal Government are unnecessary or improper or

whether the total grant is dangerous to the jurisdiction left in the States.

In this connection, Madison discusses the welfare clause. He first states,

> "It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare."

He then adds,

> "No stronger proof could be given of the distress under which the writers labor for objections than their stooping to such a misconstruction."

He then goes on to show that nothing is more natural nor common than first to use a general phrase and then to explain or qualify it by recital of particulars and that it is clear that the particulars here explain and limit the general clause. He further points out that the words were taken from the Articles of Confederation and that in those Articles they clearly were not intended to give the Congress under the Confederation unlimited powers.

It is to be noted that Madison does not mention what is now known as the Hamiltonian view. The reason, as we explain below, is that no such view had at the time been suggested by any responsible person. The objection presented was broader than the mere application of money. The claim had been made that Congress could "exercise every power." Naturally this included the application of money, but the objection was that Congress could legislate as well as apply money to matters not included within the specifically enumerated powers. Consequently the question considered by Madison in the

Federalist was whether the general welfare clause gave an unlimited power of *legislation.* Madison's line of reasoning is applicable to the narrower claim. Had it occurred to anyone that the right to appropriate as to such matters, but not the right to legislate with respect to them was granted, Madison would surely have referred to it.

In No. XV. Hamilton says,

> "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist." (Pages 90, 91).

In No. XV. and No. XXI. the lack of sanction to the laws of the subsisting Confederation is emphasized. In No. XXII. the necessity of national power to regulate commerce among the States is emphasized, and in No. XXIII. Hamilton sets forth the *principal purposes* to be answered by Union in the following words:

> ". . . . . the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries." (Page 144).

It is perfectly clear that the idea of giving the Federal Government power to spend money for purposes not confided to the Federal Government was utterly foreign to the purposes of the founders, and was entirely unnecessary as a means of curing the evils of the Confederation and attaining the great objects for which the Constitution was framed.

9. THE WORDS "COMMON DEFENCE" AND "GENERAL WELFARE" WERE TAKEN FROM THE ARTICLES OF CONFEDERATION, WHERE THEY HAD THE LIMITED MEANING FOR WHICH WE CONTEND.

The words "common defence" and "general welfare" were taken from the Articles of Confederation and should naturally be given the meaning which they had in that instrument.

In the Articles of Confederation the words did not mean objects which the States had the right and ability to control and over which the United States exercised no authority.

What "common defence" did mean in the Articles of Confederation was defense in a war, and since only Congress could declare war or peace it necessarily meant defense in a war in which the United States was engaged. What "general welfare" meant, was the welfare of the States which was common to all of the States, and was to be promoted by the use of the powers given to the Confederacy.

The Articles of Confederation had nothing to do with individuals in the States. It was a "league of friendship," (Article III) a "Confederacy," (Article I). The Articles were called "Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay" etc. It was executed by the several delegates "on the part and behalf of separate and individual states."

That these States were at that time recognized as being independent and sovereign States is well recognized in our Constitutional Jurisprudence. ". . . . all laws made by the several States, after the Declaration of Independence, were the laws of a sovereign and independent government." This was the utterance of a strong Federalist, Mr. Justice Chase in *Ware* v. *Hylton,* 3 Dallas, 199, 225.

"By the Revolution, the duties as well as the powers of government, devolved upon the people of New Hampshire." (Chief Justice Marshall, in *Dartmouth College Case,* 1819, 4 Wheat. 518, 651).

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government." (Mr. Justice M'Lean, in *Wheeler* v. *Smith,* 1849, 9 How. 55, 78.)

Various States passed laws for the encouragement by tariff or otherwise, of manufactures and new agricultural enterprises, and the tariff policy of the several States evoked sharp conflicts with their neighbors and was one of the causes which led to the calling of the Federal Convention.

Here we have the picture of thirteen States each independent of the others, and each legislating for the welfare of its own inhabitants, unrestricted by its neighbors and often times in antagonism to them.

The Articles of Confederation left the great bulk of these matters to the several States. The exclusive powers were given to the United States, in Congress assembled, by Article IX. of determining on peace and war, except in certain instances, of sending and receiving ambassadors, entering into treaties and alliances, with certain qualifications, of establishing rules in prize cases, of granting letters of marque and reprisal in times of peace, appointing courts for the trial of piracies and felonies committed on the high seas and cases of captures; they were given authority to determine disputes between two or more States concerning boundary, jurisdiction, or other causes; they were given the sole and exclusive right and power of regulating the alloy and

value of coin struck by their own authority, or by that of the respective States, fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits were not infringed; establishing and regulating post-offices; appointing all officers of the land forces, in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces; making the rules and regulations of the land and naval forces and directing their operations. They were given authority to borrow money or emit bills of credit on the credit of the United States; to build and equip a Navy; to agree upon the number of land forces and to make requisitions from each State for its quota. *These in general were the matters which Congress could deal with, and they were the matters which had to do with the* "COMMON *defence*" *of all of the States and their* "GENERAL *welfare*" *considered as a Confederation.*

The words "common defence" and the words "general welfare" are used in Article III and Article VIII of the Articles of Confederation. Article III provides:

> "The said States hereby severally enter into a firm league of friendship with each other, for their **common defence,** the security of their liberties, and their mutual and **general welfare,** binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

Article VIII provides:

> "All charges of war, and all other expenses that shall be incurred **for the common defence or general welfare,** and allowed by the United States in Con-

gress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. . . ."

Article II provides:

"Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Can it be reasonably contended that under Article VIII Congress had authority to spend money for any other purpose except those concerning which it had been expressly given power to deal by the Articles of Confederation? We think not.

Madison in the debate of the Codfisheries Bill, (1792) said,

"It is to be recollected, that the terms 'common defence and general welfare', as here used, are not novel terms, first introduced into this Constitution. They are terms familiar in their construction, and well known to the people of America. They are repeatedly found in the old Articles of Confederation, where, although they are susceptible of as great latitude as can be given them by the context here, it was never supposed or pretended that they conveyed any such power as is now assigned to them. On the contrary, it was always considered as clear and certain, that the old Congress was limited to the enumerated powers, and that the enumeration limited and explained the general terms. I ask the gentle-

men themselves, whether it ever was supposed or suspected that the old Congress could give away the moneys of the State in bounties, to encourage agriculture, or for any other purpose they pleased? If such a power had been possessed by that body, it would have been much less impotent, or have borne a very different character from that universally ascribed to it." (*Annals of Congress,* Second Congress, p. 387.)

It is obvious that the United States, under the Articles of Confederation, did not seek to raise money for purposes which they did not attempt to control. Their original, primary purpose was to carry through the Revolution successfully. At all times they had insufficient money to pay their troops and pay for military supplies, and the debts which they had contracted for the purposes of the Revolution. In the four years after the Revolution ended, they were unable to raise money to pay their debts contracted for war purposes. The furthest possible thing from their minds was to raise money for matters which they did not attempt to control. They were unable to raise sufficient for the purposes they did attempt to control. The possibility or desirability of raising money to apply to State purposes was remote from anyone's mind. The sole question was whether they could raise enough money for their own purposes, and they failed in this.

THE CONTENTION OF THE GOVERNMENT—THAT THE GENERAL WELFARE CLAUSE WAS NOT GIVEN A RESTRICTED MEANING IN THE ARTICLES OF CONFEDERATION—IS NOT SUSTAINED BY THE EVIDENCE ADDUCED.

The contention of the Government, that under the Articles of Confederation, the Congress had power to requisition money from the States without restriction

as to the purpose for which it was to be used, (Government's Brief, page 142), is unsupported by evidence.

Remarks of Sherman.

Sherman said that the Congress of the Confederation had the right to say how much the people should pay and to what purposes it should be applied. (Government's Brief, p. 142.) All he meant was what purposes within the scope of their powers—in the same sense that it may be stated that the Board of Directors of a corporation has the right to say for what purposes the money of the corporation may be applied. The subject he was discussing was the proposal that the powers of legislation be vested in a congress of one branch, as under the Confederation. When the issue raised in the instant case was presented to Sherman in the first Congress, he showed plainly that he favored the Madisonian interpretation. (*Infra*, pp. 118-119.)

Madison's remark relied on by the Government.

The Government quotes Madison as saying that the practice under the Articles of Confederation was one of "undefined authority." Its implication is that Madison meant a practice of undefined authority with respect to the spending of money. But Madison was not talking about the *spending of money,* but the *exercise of power to legislate,* when he used those words, which are taken from the body of his letter to Stevenson. It is the supplement that deals with the Hamiltonian theory.

Nicholas' Speech in Virginia Convention.

The Government contends that Nicholas' speech in the Virginia Convention shows that he believed the welfare clause gave an unlimited right to appropriate money.

What Nicholas meant was that there was an unlimited right to raise money for the general welfare.

Nicholas' argument does not attempt to deal with the question of what subject matters were included under the general heading "common defence and general welfare." What would Nicholas have said if he had been asked whether Congress, under the Confederation had, or under the Constitution, was to have, an unlimited power to raise money to free the slaves in the several States? He would have said— "Slavery is a local matter, Congress cannot control it directly or by the use of money. The powers of the Confederation did not extend to slavery— it was not part of the common defence or general welfare and the same is true under the Constitution."

10. DEBATES IN FEDERAL CONVENTION SUPPORT MADISON'S INTERPRETATION

(a) Hamiltonian Doctrine Not Considered.

In the early meetings of the Convention the discussion was confined to the principles of the Virginia resolutions. There is not in all this discussion any mention of any such right as Hamilton subsequently contended for.

Proposals were made to give the Federal Government more power than was ultimately granted it by the Constitution as adopted. Hamilton went farther than others and proposed that the Congress should have power, subject to Executive veto to "pass all laws whatsoever", and all state laws contrary thereto were to be void, which of course was not accepted (*Debates in the Federal Convention of 1787* by James Madison, Hunt & Scott ed., pp. 118, 119.)

There was, however, in the course of the Convention, no suggestion whatsoever of giving the Federal Gov-

ernment power to appropriate money for objects outside the field of federal power, which constitutes the Hamiltonian doctrine.

(b) Account of Proceedings.

On July 24th although the Convention had not quite finished its discussion of general principles, a committee of five was "appointed to report a Constitution conformably to the resolutions passed by the Convention." The committee reported its draft of the Constitution on August 6. (*The Debates in the Federal Convention of 1787* by James Madison; Hunt & Scott, editors, p. 337.) In this draft the taxing clause was contained in Article VII, Section 1, as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises; . . . . " (*Idem.*, p. 340).

Under the provisions of this clause Congress clearly would have been limited to taxing for the fulfilment of the powers entrusted to it, as it would have been clearly implied that the power to tax was in aid of and for the purpose of enabling the United States to accomplish the purposes for which it was formed and the powers confided to it.

In the discussion preceding the adoption of this provision, on August 16, Mr. Carroll expressed doubts as to the propriety of a mere majority of Congress being a quorum, on account of the difference of interest among the States (*Idem.*, p. 410). Mr. Mason urged that the provision in Section 4 of Article VI of the draft of Constitution, forbidding a tax on exports, be made a part of the taxing clause which authorized the levying of taxes. He proposed an amendment of the taxing power

to this effect. *Ibid.* Considerable discussion ensued as to whether exports ought to be taxable by Congress. It was finally decided that consideration of the clause prohibiting taxes on exports be postponed until the clause should be reached in the place in which it stood in the report. Section 1 was then agreed to, Mr. Gerry alone voting no (*Idem.*, p. 412).

The Discussion related to the payment of the existing debts of the Confederation and of the States.

On August 18 the question of the payment of the debts of the Confederation and of the debts of the States incurred in the Revolution was brought up for consideration.

Both the securities of the Confederation and of the States were selling for a small portion of their par value. The Articles of Confederation provided, as shown above, that "all charges of war and other expenses incurred for the common defence or general welfare and allowed by the United States in Congress assembled should be defrayed out of a common treasury to be supplied by the several states."

The Confederation, therefore, had the right and duty to care for the State debts incurred for these purposes but as the States refused to pay their allotments, no settlement with the States could be made by the Confederation. As the debts of the States were not proportionately equal, some of the States would have necessarily supplied funds to pay the debts of others.

A substantial part of the public debts of the States and the United States was held by speculators or others who had bought them at a big discount. ". . . unmerited misfortune and patriotic distresses," said John Jay,

"became articles of speculation and commerce." (Paul Leicester Ford, *Pamphlets on the Constitution,* p. 71.)

Public opinion as to how to deal with this situation was divided. Some were for repudiation. Some were for payment on a basis which would give holders the amounts only they had paid for the securities. Some were for full payment but for dividing the proceeds among the original holders who had given full value and the purchasers who had bought at a discount. Others, of course, strenuously advocated full payment to the holders at face value.

The Convention showed a division of opinion.

On August 18 Mr. Gerry

> "remarked that some provision ought to be made in favor of public Securities, and something inserted concerning letters of marque, which he thought not included in the power of war. He proposed that these subjects should also go to a Committee." (*Idem.* p. 421.)

Gerry's motion was later on the same day, committed, *nem. con.,* to the Committee of Detail (*Idem.,* p. 422).

Mr. Rutlidge moved

> "that a Grand Committee be appointed to consider the necessity and expediency of the U. States assuming all the State debts. A regular settlement between the Union & the several States would never take place. The assumption would be just as the State debts were contracted in the common defence. It was necessary, as the taxes on imports the only sure source of revenue were to be given up to the Union. It was politic, as by disburdening the people of the State debts it would conciliate them to the plan." (*Ibid.*)

Mr. Sherman

"thought it would be better to authorize the Legislature to assume the State debts, than to say positively it should be done. He considered the measure as just and that it would have a good effect to say something about the Matter."

Mr. King

"thought the matter of more consequence than Mr. Elseworth seemed to do; and that it was well worthy of commitment. Besides the considerations of justice which had been mentioned, it might be remarked that the State Creditors an active and formidable party would otherwise be opposed to a plan which transferred to the Union the best resources of the States without transferring the State debts at the same time. The State Creditors had generally been the strongest foes to the impost-plan. The State debts were probably of greater amount than the federal. He would not say that it was practicable to consolidate the debts, but he thought it would be prudent to have the subject considered by a Committee."

It was voted that the committee be appointed to consider the assumption in accordance with Mr. Rutlidge's motion. (*Idem.*, p. 422.)

A Committee of eleven, one from each state, was thereupon appointed to consider the matter. (*Idem.*, p. 423.)

On August 21, Livingston for the Committee of Eleven proposed the following:

"The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the U. S. as the debts incurred by the several States during the late war, for the common defence and general welfare."

This is the first introduction of the words "common defence and general welfare" in connection with the taxing power. It is most important to note the sense in which the words are used. By Article VIII of the Articles of Confederation the United States was to pay the expenses and debts of the States "incurred for the common defence or general welfare."

In the August 21 resolution we have the words used merely to define the debts of the United States, that is, its own direct debts, and the States' expenses it had agreed to pay, viz., those incurred by the States for the common defense or general welfare.
It was agreed nem. con. that the report should lie on the table. (*Idem.*, p. 436.)

On August 22 a discussion of this proposed provision occurred.

> "Mr. Ellsworth argued that the provision was unnecessary. The U. S. heretofore entered into Engagements by Congs. who were their agents. They will hereafter be bound to fulfil them by their new agents."
>
> "Mr. Randolph thought such a provision necessary: for though the U.S. will be bound the new Govt. will have no authority in the case unless it be given to them."
>
> "Mr. Madison thought it necessary to give the authority in order to prevent misconstruction. . . ."
>
> "Mr. Gerry thought it essential that some explicit provision should be made on this subject so that no pretext might be made for getting rid of the public engagements."
>
> "Mr. Govr. Morris moved by way of amendment to substitute,

> "'The Legislature *shall* discharge the debts & fulfil the engagements of the U. States.'
>
> "This amendment was agreed to all the states being in the affirmative." (*Idem.*, pp. 450-451.)

On the same day, August 22, the Committee of Detail, of which Rutlidge was Chairman, reported on several matters. Among them was Gerry's proposal to provide for public securities. The Committee reported that, in their opinion, the following addition should be made to the report [*i.e.*, the draft of the Constitution] now before the Convention, namely,—

> "At the end of the first clause of the first section of the seventh article add, 'for the payment of the debts and necessary expenses of the United States, provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years.'" (*Idem.*, p. 448.)

The consideration of the report was postponed (*Idem.*, p. 450), and was not acted on until August 31, when it was referred to the Committee on Unfinished Portions (*Idem.*, p. 502).

In the period between August 22 and August 31, further action was taken on the proposal of the Committee of Eleven, as amended on Govr. Morris' motion.

On August 23 the clause as so amended was agreed to, but—

> "Mr. Butler expressed his dissatisfaction lest it should compel payment as well to the Bloodsuckers who speculated on the distresses of others, as to those who had fought & bled for their country. He gave notice that he should move for a reconsideration." (*Idem.*, p. 457.)

On August 24 he again moved that the provision be reconsidered the next day. "He dwelt on the division of opinion concerning the domestic debts, and the different pretensions of classes of holders." (*Idem.*, p. 460.)

On August 25 the clause was reconsidered. It was objected by Col. Mason that the term "shall" will beget speculations; that there was a great distinction between original creditors and those who purchased fraudulently of the ignorant and distressed. . . . (*Idem.*, p. 465.)

After further debate—

Mr. Randolph "moved to postpone the clause in favor of the following

'All debts contracted & engagements entered into, by or under the authority of Cong. shall be as valid agst. the U. States under this Constitution as under the Confederation.'" (*Idem.*, p. 466.)

After further debate the Randolph motion was adopted, only Pennsylvania voting in the negative. (*Idem.*, p. 467.)

The provision was ultimately incorporated in the Constitution, as the first clause of Article VI. (*Idem*, p. 553.)

Immediately after the vote on Randolph's motion was taken on August 25—

> "Mr. Sherman thought it necessary to connect with the clause for laying taxes duties &c an express provision for the object of the old debts, &c—and moved to add to the 1st clause of 1st. sect. art VII 'for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare.'
>
> "The proposition, as being unnecessary, was disagreed to, Connecticut alone, being in the affirmative." (*Ibid.*)

On August 31 it was agreed to "refer such parts of the Constitution as have been postponed and such parts of reports as have not been acted upon to a committee consisting of one member from each state appointed by ballot." This was the so-called "Committee on Unfinished Portions," previously referred to.

To this Committee, accordingly, was submitted the report of the Committee of Detail on Gerry's motion to provide for the public securities which had remained unacted on since August 22.

On September 4 this committee reported the taxation and welfare clause substantially as it now stands*† and *it was agreed to nem. con., without debate,* and there was no further discussion of it in the records.

(c) Conclusions to be Drawn.

The above record is of the greatest importance for the following reasons:

First. It shows that under the provision in the original draft of the Constitution there was only an authority to tax which would clearly have limited taxation to provid-

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*NOTE: The wording was—

"The Legislature shall have power to lay and collect taxes, duties, imposts & excises, to pay the debts and provide for the common defence & general welfare, of the U.S." (*Idem.*, p. 507.)

†NOTE: The uniformity clause was added in convention on September 14 (*Idem.*, p. 563). "Legislature" was changed to "Congress" in the report of the Committee on Stile (*Idem.*, p. 548). This report of the Committee on Stile shows a semi-colon (;) (instead of a comma (,)) after "excises," which had not appeared in the clause as adopted on September 4 and did not in the Constitution as adopted by the Convention (*Idem.*, p. 630). *Cf.* Remarks of Albert Gallatin, June 19, 1798, in Congress (*Annals of Congress, 5th Congress*, Vol. 2, p. 1976). Madison referred to the semi-colon as in the Committee's on Stile's report as "an erratum of the pen or of the press." (Letter to Stevenson, November 17, 1830, Farrand, *Records of the Federal Convention*, Vol. III, pp. 483, 492.) *Cf.* also, Henry St. George Tucker, in *American Bar Association Journal*, Vol. 13, pp. 363, 465, 468.

ing funds for the accomplishment of the powers granted Congress.

Second. It shows that the welfare clause was adopted without any debate or objection or without any intimation that it granted the enormous powers now contended for, in spite of the fact that Madison and also Williamson, who a few years later so strongly denounced the right as defeating the intention and restrictions imposed in the Constitution (*supra,* pp. 89-91), were present when it was adopted.

It shows a tacit and unquestioning assumption on the part of the delegates that Federal money was to be spent for Federal objects and for those alone. The unanimity of the Committee that reported the general welfare clause and the entire absence of any request by any delegate for an explanation of the meaning of the words, or of any objection or protest, are wholly persuasive. The words had a definite and well understood meaning in the Articles of Confederation; no one even dreamed that they would afterwards be twisted into the interpretation which Hamilton subsequently sought to place upon them. There was not even a suspicion that such a construction could be placed upon the words; if there had been, can it be for one moment supposed that the Southern delegates would have remained silent? Can it be supposed that Madison, Williamson, Butler and Baldwin—all of whom were on the Committee on Unfinished Portions, and all of whom subsequently disagreed with Hamilton's interpretation—would have concurred in the report of the Committee which added the welfare clause to the taxing clause? Hamilton's subsequent interpretation was ingenious; but it was so far from the real thought in the minds of the delegates at the time the

Constitution was being debated, that it did not even occur to them. The fact that there was not even a question made about it shows how utterly foreign Hamilton's interpretation was to what was in the minds of the delegates.

The debates of the Convention between August 6th and September 4th are replete with evidence of the economic division of interests between the States, of the zeal and energy with which the delegates from each State undertook to espouse the cause of their respective constituents. The debate over the number of representatives; (*Debates in the Federal Convention of 1787* . . . . by James Madison, Hunt & Scott, Editors, page 358 *et seq.*); on entrusting the Senate with the power of originating money bills; (*Idem.*, page 388, 395); upon the militia; (*Idem.*, page 425, 452, 453); concerning the right of Congress to tax exports; (*Idem.*, page 439 et. seq.); concerning the prohibition of the slave trade; (*Idem.*, page 442 et seq.); the debate over the compromise involving the restriction of the slave trade and the elimination of the two-thirds requirement for the passage of Navigation Acts; (*Idem.*, page 483 et seq.);—all these demonstrate the conflict of interests which at times threatened to be irreconcilable. The power of Federal taxation was subjected to the closest scrutiny, and restrictions upon the taxing power were the result of a studied design to prevent inequality in taxation. *Hylton* v. *United States*, 3 Dallas, 171, 177; *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, 563, 564, 587, 588; *Knowlton* v. *Moore*, 178 U. S. 41, 95, 96. Butler of South Carolina considered the interests of the Southern and of the Eastern States "to be as different as the interests of Russia and Turkey." (*Idem.*, pp. 484, 485.) Pinkney of South Carolina mentioned five

distinct commercial interests, and alleged that "these different interests would be a source of oppressive regulations if no check to a bare majority should be provided." (*Idem.*, page 483.) A power over exports, said Gerry of Massachusetts, "will enable the Genl. Govt. to oppress the States as much as Ireland is oppressed by Great Britain." (*Idem.*, page 440), and the same power Butler declared to be "unjust and alarming to the Staple-States." (*Idem.*, page 439.) Is it not significant that while so many provisions evoked storms of dissension and debate, the general welfare clause created not even a ripple of comment or inquiry?

Third. The reason for the adoption of the clause is clearly shown.

Those desiring that the Constitution should provide that the old debts "*shall* be paid" were defeated on Aug. 25, it being thought by the majority wiser merely to provide that the old obligations should be obligations of the new government without providing that the new government must necessarily care for them, or in what form, thus leaving this disputed question as to the manner in which these obligations should be cared for to later determination.

Sherman on August 25, immediately after the vote striking out the mandatory clause requiring the payment of the old debts insisted that it be shown in the taxing clause, that taxes could be levied for the payment of such debts, presumably so that no one would seek to avoid the responsibility of payment by contending that the authority to raise the money by taxation to pay them was not explicitly granted. He asked in order that there should be no doubt in the matter that the taxing clause

contained in Article VII, Section 1, be amended to read as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare."

His sole purpose was to make clear that Congress could levy taxes to pay the old debts which, by the separate action which had immediately before been adopted by the Convention, it was provided should be valid against the new government. The purpose of suggesting the addition of the phrase relating to defraying of expenses, etc., after "said debts" was to prevent a limitation of the taxing power to payment of debts and in suggesting it Sherman had not the slightest notion that he was adding the grant of vast power to the United States now contended for. Sherman was subsequently a member of the Committee on Unfinished Portions which reported the general welfare clause in the form adopted, and presumably brought up in the Committee the substance of his motion of August 25 which had been defeated and secured the consent of the Committee to report it with certain verbal alterations. The recommendation of the Committee of Eleven—"for the payment of the debts and necessary expenses of the United States,"—Sherman's motion,—"for the payment of said debts and for the defraying of the expenses that shall be incurred for the Common defence and general welfare,"—and the provision reported by the Committee on Unfinished Portions—"to pay the debts and provide for the Common defence and general welfare, of the U. S.,"—all meant practically the same thing. The

real concern, as the debates show, was with respect to payment of the old debts.

Fourth. The reason for the addition of the words "for the common defence and general welfare" is self-evident. Had the provision read that Congress might "lay and collect taxes, etc. for the payment of the debts", the question would have immediately arisen as to whether Congress could lay taxes for any other purpose. It was obviously essential to add some other phrase showing that it could also levy taxes to carry out its other powers.

Under the Articles of Confederation, Congress was given the power to collect from the States all expenses incurred "for the common defence or general welfare". These words, as Madison has said, had been understood as only authorizing Congress under the Articles of Confederation to raise money for the purposes which it undertook to control. To use Madison's own words,

> "The similarity in the use of these phrases, in the two great federal charters, might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said, that in the former, they were ever understood to be a general grant of power, or to authorize the requisition or application of money by the old Congress, to the common defense and general welfare, except in cases afterward enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and remodelled by the present Constitution, it can never be supposed that when copied into this Constitution, a different meaning ought to be attached to them." (*Report on the Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551.)

While the Convention had voted that it was unnecessary to adopt Sherman's suggestion since the power to raise money to pay the old debts, which had been expressly stated to be obligations of the new government, was necessarily implied, it seems obvious that the words, as Sherman suggested, would add some emphasis, just as the Tenth Amendment later added emphasis, to the reservation of powers to the States. Since those who strongly urged that the payment of the debts be made mandatory had been defeated, it seemed a slight concession to insert the suggestion made by Sherman which was in line with Gerry's previous motion of August 11 that provision be made for the public securities, and the recommendation of the committee of eleven. While the mandatory provision had been defeated the Committee on Unfinished Portions took this opportunity to adopt Sherman's suggestion and make this slight concession.

(d) Evidence of Sherman's Speech on the Proposed Glass Manufactory Loan.

That Sherman had not the slightest idea of introducing into the Constitution a provision which should empower Congress to apply money for purposes concerning which they were not authorized to legislate, is confirmed by his attitude on the proposal that the Secretary of the Treasury of the United States be authorized to make a loan of not exceeding $8000. to one Amelung to aid him in maintaining his "American Glass Manufactory" which was considered by the First Congress under the Constitution, of which Sherman was a member.

On June 3rd, 1790 the proposal was debated and defeated.

> "Mr. Smith, of South Carolina, and Mr. Sherman, objected to the report of the committee. They doubted the Constitutionality of the power of Con-

gress to loan money to their constituents; they objected to it on account of the precedent it would establish, and supposed that the encouragement and assistance would be applied for with more propriety to the State Government." (*Annals of Congress; 1st Congress;* Vol. 2, page 1630.)

And later in the debate

"Mr. Sherman read that part of the Constitution which he conceived was contrary to the proposition in the report." (*Idem.,* p. 1631.)

11. HAMILTON'S DOCTRINE WAS NOT AN ISSUE IN THE CAMPAIGN FOR RATIFICATION OF THE CONSTITUTION.

The ingenious theory of Constitutional interpretation, that while the Federal Government was one of enumerated powers, and those powers could not be exceeded, yet nevertheless Congress might apply money in furtherance of objects over which it had no power of regulation and control, was still unborn during the struggle over the ratification of the proposed Constitution. The occasion had not yet arisen which was to cause it to germinate in Hamilton's resourceful brain. The battle over ratification was fought along a broad front, and with considerable bitterness, as was natural, considering the sharp cleavage of economic and social forces. The contest was exceedingly close. Consolidation, and tyranny, it was predicted, would result if the Constitution were adopted. "Centinal" claimed that they had entirely annihilated the old Confederation and the particular governments of the several States, and instead had established—

". . . . one general government that is to pervade the union; constituted on the most *unequal* principles, destitute of accountability to its constituents, and as despotic in its nature, as the Venetian Aris-

tocracy. . . . ." (McMaster & Stone, *Pennsylvania and the Federal Constitution,* page 595.)

It would be absurd to accept this interpretation of the Constitution, or the other extravagant claims which were made with respect to the probable effect and operation of various clauses, including the taxing clause. Prejudice distorted the purpose of the Constitution and read a sinister intention in every clause.

It is rather to the temperate and scholarly exposition of the *Federalist* that we should look for the meaning intended to be attached to the Constitution by its framers, and from this we have seen, that Madison interpreted the general welfare clause (and in this interpretation Hamilton, as his collaborator, *at that time presumably agreed*) as being explained and qualified by the subsequent enumeration.

It is true that Madison was not considering the Hamiltonian doctrine—there was then no Hamiltonian doctrine to consider—but Madison's exposition is clearly applicable to the Hamiltonian doctrine and was subsequently applied by Madison to the Hamiltonian doctrine. The power of taxation was a focus of opposition, but the particular interpretation subsequently attached to the general welfare clause by Hamilton was not discussed. It is true, that instances may be found in which the opponents of ratification claimed that under the general welfare clause Congress might legislate as to any matters it saw fit and of course make expenditures therefor. But no one made the distinction that Congress would have the right to appropriate money for purpose with respect to which it was forbidden to legislate, which was later advanced by Hamilton.

The real issues of the campaign, with respect to taxation, were whether Congress ought to have the taxing

power at all, or whether the power granted was too extensive as respects the methods and objects of taxation; whether it would operate unjustly as between States (*Cf.*, Oliver Ellsworth in Connecticut. Government's brief, appendix, pages 34, 35), whether it would divest the States of the power to tax for their own welfare.

The position of the advocates of ratification was that the power of taxation was necessary because the futility of the requisition system had been shown by the experience under the Confederation. In the second place a power to lay a tariff duty alone, to which it was suggested it be limited, was not sufficient because, while it might suffice in times of peace, in the event of a foreign war, cutting off commerce, revenue would fail and the Government credit with it, and the Government would be unable to provide for the national defense. Direct taxes and excises must be at the command of government; the power of taxation should be commensurate with the objects of the Government. Any limitation, therefore, as to the character of property on which taxes might be levied, or upon the amount which might be raised, would be likely to lead to repetition of the futility of the Confederation. "Every power," said Hamilton, "ought to be in proportion to its object. . . ." (*Federalist*, No. XXX.) As there was no way of telling how much money would be needed to defend the country in case of war, it was folly to place a limitation upon the power of the Government to raise money for this purpose. But there is no suggestion by the advocates of ratification that the Federal Government should have power to raise money to apply to matters which the Federal Government was not constituted to control; on the contrary, the implication is that if the power is to be proportioned to the objects, it does

not exist where there are no objects to which to attach itself.

It was freely admitted by the advocates of ratification that Congress had power to tax for the general welfare. And why not? General welfare under the Confederation meant the attainment of those general objects which the Confederation was organized to accomplish; it did not include matters which were "expressly reserved" to the States. By putting ourselves in the position of a citizen of a State whose principal interests were safeguarded by the State, and who in respect to a few matters, relating principally to national defense, looked to the Congress of the Confederation for protection, we plainly see that the term "general welfare" had a limited meaning, bounded by the powers of the Confederation. Of course if the new government were to be given greater powers, then general welfare would have a wider application.

Those who explained that the Federal Government should have an unlimited power to raise money, meant an unlimited power to raise money for the objects of the Federal Government. We submit that, carefully examined, there is not in the quotations collected by the Government a single statement made therein to the adoption of the Constitution which expresses the doctrine subsequently formulated by Hamilton.

Among the numerous amendments proposed to the Constitution, none related to the general welfare clause. Madison's explanation, and similar expositions, presumably set at rest fears that it conferred an unlimited power to legislate. Had the suggestion been seriously made, or taken seriously, that the Federal Government could tax not only for its own purposes, but for State purposes as well—could do all that money could do to enlarge and extend its sphere of influence,—some

action would have been taken toward amendment. It remained for Hamilton, a few years later, to evolve this novel doctrine, and by his prestige and influence, to give it an air of respectability.

12. AN ADDITIONAL REASON FOR ACCEPTING MADISON'S VIEW IS HIS PREEMINENT QUALIFICATIONS.

Madison was better qualified than any other member of the Constitutional Convention to give a correct interpretation of the intent of the members of the Convention as to the meaning of the Constitution.

He was the first to propose that the States meet to consider commercial relations which resulted in the Annapolis Convention of 1786 and the call for the Constitutional Convention. He was a student and had devoted himself to the study of principles and systems of government. He had a large responsibility for the Virginia Plan which formed the basis for the Constitution. He took a leading part in the debates in the Convention. He was the only person to take full notes of the debates.

Moreover he was not at the time prejudiced against a strong central government. He considered that "the individual independence of the States was irreconcilable with their aggregate sovereignty, but that the unification of the whole into one single republic would be as inexpedient as it was unattainable." (Letter to Washington, April 16, 1787. Madison's *Works,* published by order of Congress, Vol. I, p. 287.) He believed that a practical compromise was the system of dual sovereignties which was adopted, but he considered that it was "absolutely necessary to a perfect system" that the United States have the right to negative the laws passed by the States (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 75).

Throughout a distinguished career devoted to the public service, Madison was steadfastly of the opinion that the general welfare clause did not give Congress power to legislate, or to appropriate money, for purposes outside of the scope of the subsequently enumerated powers. His opinion in the 41st number of the *Federalist* related to the objection that Congress might assume to exercise an unlimited power of legislation, but the reasoning is equally applicable to the narrower claim. His speech on the Bank Bill in 1791, (*Annals of Congress,* First Congress, pages 1896-1897) also related to the claim of power. But after Hamilton had announced the new doctrine in December of 1792, Madison denounced it in a letter written to Edmund Pendleton in the following month, (*Letters and writings of James Madison,* published by order of Congress, Volume I, page 545), and within a fortnight in the debate on the Codfisheries Bill, elaborated his views in opposition. (*Annals of Congress,* Second Congress, pages 386-388.) He again indicated the same point of view in the Third Congress in the debate over the Bill for the Relief of Refugees from San Domingo. (*Annals of Congress,* Third Congress, pages 170, 171.) The Virginia Resolutions, which are attributed to Madison, deplored the tendency to enlarge the powers of the general government by forced construction, so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty. (*Federalist.* Ford's Edition, page 685.)

In the following year Madison's report on the Virginia Resolution in the Virginia House of Delegates, dealt at length with the general welfare clause and with

the alternative alleged powers sought to be derived from it by forced construction. (*Elliot's Debates*, Second Edition, Volume IV, page 551 et seq.)

When the matter came before him as Chief Executive he acted upon his opinion by vetoing the Bank Bonus Bill. (Richardson. *Messages and Papers of the Presidents*, Volume I, page 584.)

After Monroe became President, Henry St. George Tucker sent to Madison a copy of the report on roads and canals, upon which the Government relies in its brief. (Page 150.) In reply Madison said,

> "I must pray you, my dear sir, to be assured that, although I cannot concur in the latitude of construction taken in the Report, or in the principle that the consent of States, even of a single one, can enlarge the jurisdiction of the General Government, or in the force and extent allowed to precedents and analogies introduced into the Report, I do not permit this difference of opinion to diminish my esteem for the talents, or my confidence in the motives, of its author."
>
> (*Letters and Other Writings of James Madison.* Published by order of Congress. Volume III, page 54.)

In a letter to President Monroe about the same time, (December 27th, 1817) he says

> "Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal,

and under a weariness of mind as little admitting a vigilant attention.

"Another, and perhaps a greater danger, is to be apprehended from the influences which the usefulness and popularity of measures may have on questions of their constitutionality. It is difficult to conceive that any thing short of that influence could have overcome the constitutional and other objections to the Bill on roads and canals which passed the two Houses at the last session." (*Idem.*, page 56.)

And finally in his celebrated letter to Andrew Stevenson, (*Letters and Other Writings of James Madison*, published by order of Congress, Volume IV, page 121 *et seq.*) Madison reiterated his opposition to both the broader and the narrower view.

13. HAMILTON'S INTERPRETATION WAS ORIGINATED BY HIM FROM MOTIVES OF EXPEDIENCY, AFTER THE CONSTITUTION WAS ADOPTED.

A candid student of the period is inevitably led to the conclusion that the interpretation advocated by Hamilton was inspired by political expediency or an attempt to make the central government stronger than the Convention which formulated it or the people who adopted it were willing to concede.

Hamilton himself apparently attended only the early and final meetings of the Convention and was not present when this clause was debated and adopted. He had little sympathy with the limitations placed upon the powers of the central government. At the last meeting in fact he said,

"No man's ideas were more remote from the plan than his own were known to be; but is it possible to deliberate between anarchy and Convulsion on one

side, and the chance of good to be expected from the plan on the other?'' (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 581.)

Gouv. Morris wrote:

''General Hamilton had little share in forming the Constitution. He disliked it, believing all Republican government to be radically defective.'' (Jared Sparks' *Life of Gouv. Morris,* III, 260-265; Farrand, *Records,* III, 418-419.)

On becoming Secretary of the Treasury he immediately sought in every way to draw to the government as much power as possible and the support of the moneyed classes. He was an executive and the opinions he advanced as to the meaning of the Constitution were not judicial but those of an executive seeking to accomplish his purposes.

When he published his famous Report on Manufactures in 1791 he believed that by suggesting bounties to aid manufacture he could draw manufacturers to the support of the central government as he had drawn the moneyed classes by his insistence on the payment of the old Federal and State debts.*

Madison later, accounting for the breach between himself and Hamilton, said it was due to Hamilton making perfectly plain

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*NOTE: Professor Channing says,

''Not being able to secure a 'strong government' through the Federal Convention, Hamilton was gradually building up such an organization by a liberal interpretation of the Constitution and by executive action.'' (*History of U. S., IV,* p. 162.)

''It was undoubtedly Hamilton's purpose to draw men of wealth and property to the support of the government by means of his financial measures.'' (Woodrow Wilson, *History of the Am. People,* Vol. III, p. 110.)

"his purpose and endeavor to *administration* the Government into a thing entirely different from that which he and I both knew perfectly had been understood and was intended by the Convention who framed it and by the people adopting it." (Edward Channing, *History of the U. S.* (*Letter, Trist to Van Buren*), IV, 162.)

Both Madison and Jefferson regarded Hamilton's doctrine not only as wrong, but also as *new*. Shortly after the Report appeared, Madison in his letter to Edmund Pendleton on January 21, 1792 said that the Report—

"'. . . broaches a new constitutional doctrine of vast consequence, ... I consider it myself as subverting the fundamental and characteristic principle of the Government; as contrary to the true and fair, as well as the received construction, and as bidding defiance to the sense in which the Constitution is known to have been proposed, advocated, and adopted. . . .'" (*Letters and Other Writings of James Madison,* published by order of Congress, Vol. I, pp. 545, 546.)

Shortly afterwards Jefferson in a conference with the President said,

"That it was a fact, as certainly known as that he and I were there conversing, that particular members of the Legislature . . . had from time to time aided in making such legislative constructions of the Constitution as made a very different thing from what the people thought they had submitted to; that they had now brought forward a proposition far beyond every one ever yet advanced, and to which the eyes of many were turned, as the decision was to let us know whether we lived under a limited or unlimited government. He asked me to what pur-

poses I alluded? I answered, to that in the report on manufacture, which, under color of giving *bounties* for the encouragement of particular manufactures meant to establish the doctrine that the power given by the Constitution of the United States to collect taxes to provide for the general welfare of the United States permitted Congress to take everything under their management which *they* should deem for the public welfare, and which is susceptible of the application of money; consequently, that the subsequent enumeration of their power was in the discretion to which resort must be had and did not at all constitute the limits of their authority; that this was a very different question from that of the bank which was thought an incident to an enumerated power." Jefferson's *Works*, IV 457.)

The interpretation of the general welfare clause which Hamilton suggested for the first time after the adoption of the Constitution and while he was Secretary of the Treasury was at least strongly colored by his desire to enforce his views of what the Constitution should have been and is entitled to little weight.

We submit that the following statement in Madison's letter of November 27, 1830 to Speaker Stevenson was fully justified.

"That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence." (Max Farrand, *Records of the Federal Convention*, Vol. III, pp. 483, 492.)

14. THE GOVERNMENT'S CONTENTION, THAT HAMILTON'S DOCTRINE WAS ADOPTED BY EARLY CONGRESSES, IS NOT SUPPORTED BY THE HISTORICAL EVIDENCE.

The Government contends that the Hamiltonian construction was adopted by the weight of contemporaneous opinion and by the early Congresses, and that "the practice of the earlier Congresses . . . has been uniformly followed by Congress and the Executive branch of the Government."

(a) Story's statement as illustrating a common misconception.

This statement by the Government we submit is wholly erroneous. It is a common misconception, based in large part on the statement by Mr. Justice Story, in his *Commentaries on the Constitution,* published in 1833, which was for long the standard and practically the only text book on the Constitution. We quote this passage in full, because it states specifically the precedents which it contends justify the conclusion, and we shall show below that, probably due to the fact that the debates in Congress were not published at the time these *Commentaries* were written, Story misconceived the importance and bearing of the so-called precedents.

Mr. Justice Story says (Vol. I, pp. 727-728)

> "In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance. In some cases, not silently, but upon discussion, Congress has gone the length of

making appropriations to aid destitute foreigners and cities laboring under severe calamities; in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is in the bounty given in the cod-fisheries, which was strenuously resisted on constitutional grounds in 1792, but which still maintains its place in the statute-book of the United States."

In respect to opinion and discussion by Congress and the executive branch of the Government after the adoption of the Constitution, the statement by Story and others that the Hamiltonian view was adopted generally as the proper interpretation of the Constitution and was so acted upon is without foundation. In fact, the reverse is true. There has always been opposition to this doctrine; there is not a clear-cut case of legislation in Congress adopting this view until long after Congress ceased to contain any person who had participated in public affairs at the time of the adoption of the Constitution or who was a member of the Constitutional Convention. In fact, there is not a clear-cut case which can be relied upon as showing any general acceptance of the doctrine until after the Civil War, and even then there was strong opposition.

(b) General principles applicable to evaluating legislative precedents.

In considering legislative precedents, three points are to be borne in mind.

(1) Where the construction of the Constitution is plain, no contemporary or other extraneous opinions or action by Congress or the executive branch is material. We believe the wording of the general welfare clause is sufficiently clear so that consideration of such outside opinion and practice is not permissible.

(2) In cases of doubtful construction, *contemporary* opinion is valuable because it expresses the views of those acquainted with the purposes of the framers of the Constitution. Especially is the action of the first few Congresses important, since they not only were composed of men living contemporaneously with the adoption of the Constitution, but also among the members were men who had been also members of the Constitutional Convention and who may be assumed to have understood its intention. Such contemporaneous opinion is of real value only when it is accepted by both opponents and proponents of legislation; that is when it meets with common assent. In such cases, especially where the view also receives judicial approval, it has persuasive if not conclusive force.

Thus, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351-352, Mr. Chief Justice Marshall said,

> "It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system."

He then states that the Supreme Court has many times sustained this jurisdiction and adds,

> "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state

courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens* v. *Virginia*, 6 Wheat. 264, 420, Mr. Chief Justice Marshall in speaking of the validity of the Judiciary Act said that it was adopted by a Congress containing many members of the Convention which framed the Constitution and "not a single individual, so far as is known, supposed that part of the act . . . to be unauthorized by the constitution."

In the present case, as we shall show, not only was there not common consent as to the correctness of the Hamiltonian view but there was the most violent opposition voiced in Congress, and there is not a single act in the early Congresses which constitutes a precedent. In fact the action of Congress, we submit, proves that the Hamiltonian view was opposed in all the early Congresses and not adopted by any.

As to later action by Congress, it carries little weight. It does not indicate the view of the framers of the Constitution. Unless adopted without dissent and unless there has been opportunity to test it in the courts, it has no persuasive force. Otherwise, Congress by its own action could amend the Constitution.

Abraham Lincoln said that it was a great truth, greatly uttered when John C. Calhoun stated in the Senate that "to legislate upon precedents is but to make the error of yesterday the law of today." (Charles Warren; *Congress as Santa Claus*, p. 12. Carl Sandburg; *Abraham Lincoln, The Prairie Years*, p. 489.)

Where no suit can be brought to test the constitutionality of legislation, it can carry no or little weight as a precedent. Since a citizen can not litigate the legality of

an appropriation by Congress out of the general treasury, as was held in *Massachusetts* v. *Mellon*, 262 U. S. 447, and as such appropriations heretofore have generally been made from the general treasury and no taxes have been levied, as in the present case, for the express purpose of so disbursing them, the question heretofore could not be raised unless raised by the Government itself in denying its own right to act under such laws. In *United States* v. *Realty Company*, 163 U. S. 427, the question was sought to be raised in this manner but the court held that the payment was for a "debt" and therefore it was unnecessary to determine the question. There has been no other opportunity to present it to this court.

The precedents are for the most part quite recent,—practically all of them since the Civil War, and most of them only in the last thirty years. There has always been opposition. These precedents, as stated, carry no weight.

See *Myers* v. *United States*, 272 U. S. 52, 171.

See also *Fairbank* v. *United States, supra*, in which the court set aside a construction of the Constitution which had been adopted by Congress first from 1799 to 1801 and again from 1862 to 1872, and finally by a statute of 1898.

(c) Reasons for this common misconception as to the precedents.

Before taking up the alleged precedents themselves, we wish to consider briefly what caused this common misconception in respect to the practices of Congress. It was due to a number of causes.

The first and principal reason was the fact that there was in the early Congresses no common understanding as to the powers granted Congress. The broad scope of these powers, the right of the United States to use any and all means appropriate to carry them out, and the doctrine of implied powers had not been settled or agreed

upon. The decisions of Marshall, and later decisions, which determined and defined the scope of the implied powers and laid down the principle that a real nation was established with full power to do what was necessary to provide for foreign and interstate commerce, navigation, and the other matters committed to its charge, all lay in the future.

The result was that there was great confusion and dispute as to what might be done under the express powers granted Congress. It was easy, therefore, to contend that Congress had made appropriations for matters in excess of its powers when in reality such was not the case. Thus, it was seriously contended as late as 1817 that Congress had adopted the Hamiltonian Doctrine by appropriating money for the payment of the salary of the Senate chaplain, for the purchase of books for the library at Congress and paintings for the Capitol. (See *infra*, pp. 152-3.) As the Constitution did not expressly give the right to do these things, it was contended that Congress had no power to do them unless authorized by the welfare clause.

Another cause of confusion lay in the failure to discriminate between the right to dispose of public lands, or the proceeds thereof, and the purposes for which taxes could be raised.

In Section 3, of Article IV, of the Constitution, it is provided:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States;"

It is now settled that Congress has the right to dispose of public lands by gift or otherwise for such purposes as it sees fit, and while it holds them, of course, to take such

steps as are necessary for their use and protection. The donation or appropriation of land or the proceeds thereof was confused with the right to levy taxes and dispose of the proceeds, and it was contended that if appropriations or gifts of public land could be made for certain purposes, beyond the scope of the enumerated powers, it must follow that taxes could be levied for the same purposes.

The situation at the time must also be borne in mind. Virginia and other states had, from 1780 to 1785, before the adoption of the Constitution, ceded to the United States the vast region comprising the Northwest Territory, and later Georgia and North Carolina ceded the Southwest Territory extending to the Mississippi River. The Louisiana Purchase added another immense area to the United States. The United States not only controlled this territory, but actually owned most of the land.

It was essential that roads, canals, and other developments be carried out in this territory and also in the newly admitted States shortly organized within it, and also that provision should be made so that public land might be given or sold to settlers, private individuals, and to some extent to the States.

This was essential for military and police protection of the territory and the public lands, to enable the United States to sell and dispose of the lands, and enable the new States to obtain citizens and to provide a means of interstate commerce and communication between them and the eastern, seaboard States, and also to enable the United States to establish post roads and mail service as it was authorized by the Constitution to do.

Furthermore, in the eastern States, roads were essential for intercourse between the States, for carrying mails, and for military protection. We are apt to forget that there were most inadequate facilities of this char-

acter, even in the older States, and yet these facilities were essential for carrying out the express purposes which everyone admitted were conferred on the United States. In fact, as pointed out in the Congressional debates, it was often with difficulty that a Congressman could get to Washington from his own State, due to the inadequacy of the roads.

It was clear that unless the United States had power, as it was later determined it had, to control these matters, it might not be able to defend its territories adequately and practical means might be lacking for travel between the States. The new government might, in such case, fail from impotency, as did the Confederation. It was instinctively believed that the United States was intended to have power to provide for these matters in some way. Could it step in and construct the necessary roads, canals, etc. for Interstate Commerce and for military purposes and for the development of its own vast public lands? It was strenuously denied that it could do so, since it was contended this would deprive the States of their rightful jurisdiction. Others held that the United States could construct such roads or canals within the States, but only with the consent of the States. It was contended by others that the consent of the States could not confer authority on the United States.

Under these circumstances, advocacy of the Hamiltonian interpretation of the welfare clause was resorted to by those who felt the improvements must be made and that it was intended by the framers of the Constitution that it should have such power.

"We believe that the United States has been granted power to construct such roads and canals," they said, "but if it has no such power, will you not agree that Congress has the right to apply money to their construction? This doctrine is supported by Hamilton. It does

not involve taking any jurisdiction away from the States since they will control the roads and canals after their construction."

It was urged that the framers of the Constitution did not intend to leave the United States utterly impotent in respect to these improvements, as they were necessary for the carrying out of the powers expressly conferred upon it. It was argued that the right to apply money for their construction, since such construction was necessary to enable the United States to carry out the powers expressly granted, was clearly intended.

Another influence at work was the fact that the business chaos which had existed when the Constitution was adopted had disappeared, the tariff adopted for the protection of manufacturers as well as for revenue was producing a surplus in the Treasury which could be applied to these necessary "internal improvements" (the name by which roads, canals, etc., although intended for interstate communication or military purposes, were called as distinguished from improvements relating to foreign commerce), and Jefferson suggested the adoption of a constitutional amendment to permit of the surplus being applied to such purposes. The manufacturers feared that if this surplus could not be so applied, duties would be reduced, and they therefore joined in seeking a method of diverting it to such purposes.

In spite of these strong grounds for adoption of the Hamiltonian view, the remarkable thing which strikes the reader of the debates in Congress and the Acts passed by it, is the resistance on the ground of its unconstitutionality to undertaking such improvements, although now recognized as clearly within the powers of Congress, and the persistent refusal to accept the Hamiltonian doctrine. Gradually the States themselves provided these facilities, so that it became less necessary

for Congress to do so, and gradually it became agreed that Congress had power itself to construct interstate roads, canals, etc. It also became agreed that Congress could use public lands and their proceeds for purposes other than the enumerated powers. There was a persistent refusal to use tax money for matters over which it was admitted the States and not the United States, had jurisdiction, which, with minor exceptions, persisted until within the last thirty years.

Another cause of misunderstanding was the fact that the debates in the early Congresses were not printed until some time after Story wrote his *Commentaries,* nor were Madison's *Notes on the Debates of the Constitutional Convention* available until 1840. Had these records been available, it is more than likely that Storey and others would have expressed a different view as to the practice of the early Congresses.

(d) No early precedents adopted Hamilton's doctrine.

We shall now briefly discuss the early acts relied on by Story, and relied on by the Government in the present case, to show that Congress while still composed of members who participated in public affairs at the time of the Constitutional Convention and while still containing members of that Convention adopted the Hamiltonian view.*

THE CODFISHERIES ACT, 1792.

The first Act referred to by Story and by many after him as sustaining the Hamiltonian doctrine was the Codfisheries Act of 1792. This Act, on examination, is on the whole a precedent for the Madisonian view rather than the Hamiltonian view. An import duty on salt of six cents a bushel had been laid by the Tariff Act of

*Note. There were very few members of the Constitutional Convention in Congress after 1800. (See Charles A. Beard, *Economic Origins of Jeffersonian Democracy,* pp. 34-73.)

1789 (*Annals of Congress,* 1st Congress, Volume II, p. 2129). Section 4 of that Act had provided for a payment in lieu of drawback of the duties on salt where the salt, on which the duty had been paid, was used in curing fish which was subsequently exported. This payment amounted to five cents per quintal of dried fish. (*Idem.,* p. 2131.)

The Codfisheries Bill of 1792 in its original form provided that in lieu of this drawback payment, a "bounty" should be paid to the owners of fishing vessels, to be divided with the fishermen. On motion the word "bounty" was struck out and "allowance" substituted, (*Annals of Congress,* 2nd Congress, p. 401), and in this form the measure passed.

Those who proposed the bill stated that no bounty was intended, Gerry alleging (*Annals of Congress,* 2nd Congress, p. 376) that all that was asked was the payment of an amount equal to the duty which had been paid on the salt which was used in curing the fish.

Madison himself, on the ground that it did not provide a bounty but merely a repayment of duties, voted for the bill. As the question of the right of the United States to grant bounties was raised, however, he did deliver a long and carefully reasoned speech on the subject maintaining that the Constitution did not permit the payment of bounties, and stating fully his interpretation of the welfare clause and stating that if the Hamiltonian view were to be adopted,

> "I venture to declare it as my opinion, that were the power of Congress to be established in the latitude contended for, it would subvert the very foundation, and transmute the very nature of the limited Government established by the people of America; . . ." (*Idem.,* pp. 386-389.)

Williamson of North Carolina, a member of the Constitutional Convention, present when the welfare clause was adopted by the Convention, felt that the drawback might exceed the duty and thus amount to a bounty and therefore voted against the bill, and delivered a strong speech showing why the Hamiltonian interpretation was clearly not intended by the Constitutional Convention. We have quoted from this speech above (*supra,* pp. 89-91, *Annals of Congress,* 2nd Congress, p. 378).

It is clear that the bill was understood to be concerned with a matter relating to duties on imports over which the United States has control and, that it was not enacted by Congress, on the ground that it was justified by the Hamiltonian doctrine and that it affords no support to that doctrine.

THE SAN DOMINGO REFUGEES RELIEF ACT, 1794.

In the Third Congress (1794) the San Domingo Bill relied on by Story and the government and generally relied on to support the Hamiltonian theory was enacted. Some 2,000 French refugees from the Insurrection in San Domingo fled to this country and were destitute. An appropriation of $15,000 was proposed for their relief. It was vigorously opposed by Madison, by Giles, and by Nicholas as beyond the power of Congress. As a result it was amended on motion of the speaker so as to provide that "a regular account of the money so spent be kept; and that the President of the United States be requested to obtain a credit therefor in the accounts between the French Republic and the United States." In other words, a gift of the money for these purposes was not made, because of constitutional objections to the Hamiltonian theory; it was voted that it should be regarded as an advance or a loan to the French Government. It may be noted that it would

in any event be undoubtedly justified as in aid of foreign relations.

THE WHISKEY REBELLION SUFFERERS RELIEF ACT, 1795.

The Act of February 27, 1795 (1 Stat. 423) relied on by the Government merely provides damages for those who had suffered in the so-called "Whiskey Rebellion" by reason of assisting United States officers in enforcing the excise law. Obviously the United States has a right and moral duty to recompense citizens for assisting in the enforcement of its laws and probably for failure on its part to protect against damages from such resistance. Madison spoke in debate on the Bill; he did not favor it on practical grounds, but he did not suggest that it was objectionable because it supported the Hamiltonian doctrine. It was not enacted, nor was its passage urged or suggested on the basis of that doctrine.

WASHINGTON'S RECOMMENDATIONS RELATIVE TO AGRICULTURE AND A NATIONAL UNIVERSITY.

Washington in his First Message to Congress said that "the advancement of agriculture, commerce, and manufactures by all proper means, will not, I trust, need recommendation; . . ." The words "by all proper means" must be assumed to have been used advisedly. What means Washington deemed proper, we do not know except as interpreted by his speech of December 7th, 1796, referred to hereafter. It is not improbable in view of the assumption by the First Congress that import duties might be imposed with a protective object, that Washington had in mind protective duties for agriculture. As a matter of fact a protective duty was placed upon hemp by the First Congress.

The Government relies on Washington's speech to the Senate and House of Representatives on December 7,

1796 (*Annals of Congress,* 4th Congress, 2nd Session, pp. 1594-1595) which referred to agriculture as of primary importance to individual and national welfare. He said that institutions for promoting it grew up supported by the public purse—undoubtedly referring to the agricultural associations which had been incorporated under the laws of several States and which had been the objects of State bounty as well as private assistance. It is difficult to stretch Washington's words to imply a recognition of Federal bounties to agriculture, and Congress did not so interpret them.

Under date of January 11, 1797, the *Annals of Congress* show that Mr. Swift, for the committee to whom was referred that part of the President's speech relative to promotion of agriculture, made a report recommending the institution of a society for that purpose. This society was to receive no support from the Government except, it was suggested, that possibly the salary of a secretary and the expense of stationery might be provided. The following resolve was recommended,

> "Resolved, That a society for the promotion of agriculture ought to be established at the seat of Government of the United States."

Congress took no action for the creation of such a society.

In Madison's report on the Virginia resolutions (James Madison, *Report on Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551), the latitude of power in the national councils assumed by the committee's report is deprecated, so that the failure of Congress to act upon the recommendation of the Committee presumably must be referred in part at least to opposition on constitutional grounds in Congress.

The President also referred in his address to the establishment of a national university in the District of Columbia. The plan was to give a certain amount of land for the erection of the building, but the university was to be supported entirely independently of Congress. (*Idem.*, pp. 1698-1702.) This did not involve the use of tax money. The House as a Committee of the whole voted against the project "by a great majority" (*Idem.*, p. 1704) and the proposal was eventually postponed (*Idem.*, p. 1711) and not revived in that Congress.

SAVANNAH FIRE SUFFERERS RELIEF BILL DEFEATED, 1797.

In the same Congress that declined to establish a society for the promotion of agriculture (1797), a bill was introduced to give relief to those who had "suffered by the late fire in Savannah, Georgia." The extent of the calamity was pictured as extreme. (*Idem.*, p. 1712.) Relief was denied by a vote of 55 to 24. (*Idem.*, p. 1727.) Strong constitutional objections were made.

Mr. Claiborne said,

> " . . . It was a sharp conflict between humanity to that suffering country and the Constitution." (p. 1720).

Mr. Nicholas said,

> " . . . The General Government had no power but what was given to it, but the State Governments had all power for the good of their several States. If the general welfare was to be extended (as it had been insinuated it ought) to objects of charity, it was undefined indeed." (p. 1723).

VIRGINIA RESOLUTIONS (1798), AND MADISON'S REPORT (1800) THEREON CONTROVERTED HAMILTON'S DOCTRINE.

In 1798 the famous Virginia Resolution by the Virginia Assembly and in 1800 Madison's report upon those reso-

lutions directly controverted the Hamiltonian Doctrine. Elliot's *Debates,* 2d. Ed., Vol. I, pp. 528, 550-553.)

TWO ACTS (1803, 1804) TO RELIEVE FIRE SUFFERERS RELATED TO BONDS FOR DUTIES.

Two Acts were passed, one in 1803 (6 Stat. 49) and one in 1804 (6 Stat. 53), both relied upon by the Government, for the relief of sufferers from fires. An examination of these Acts shows that they merely provided that such sufferers who had given bonds for duties might take up those bonds and give new bonds with sureties payable at a later date. This was clearly an exercise by Congress of control over collections of taxes and not a recognition of the Hamiltonian doctrine.

ACT FOR RELIEF OF EARTHQUAKE SUFFERERS IN MISSOURI TERRITORY.

The Act for the relief of sufferers by earthquake in New Madrid, Missouri (3 Stat. 211) relied on by the Government was in aid of persons in a territory, and authorized merely a grant of public lands and not tax moneys.

VENEZUELA EARTHQUAKE SUFFERERS RELIEF ACT, 1812.

The Act of 1812 (2 Stat. 730) to aid sufferers from earthquake in Caracas, Venezuela, relied on by both Story and the Government was passed almost without debate and without a discussion of the Constitutional question involved. At the time the foreign relations of the country were in a very strained condition, and we were about to engage in war with England. Venezuela, on July 14, 1811, had declared its independence from Spain and was attempting to defend its independence by force as we had done just previously, and its status was a matter of great concern to the United

States. It would seem that the grant was justified on the ground of promoting foreign relations. In any event, it was a minor appropriation made without comment or debate. Had it been recognized as establishing the Hamiltonian principle, it is clear, that it would have excited debate, and entirely clear, that Madison, then President, would have vetoed it. Stevenson, of Virginia, at a later date (January 19, 1827) said with respect to the Venezuela Act and also the Act in aid of the San Domingo refugees (*Congressional Debates,* Vol. III, pp. 757-8):

> "Might not those cases have been defended under the power of the General Government for great external objects? The war and treaty making power, and foreign relations, belongs exclusively to this Government, and, in their exercise, can never conflict with any of the reserved powers of the States. . . . May not those who passed these acts have considered the right to do so as belonging to these great classes of powers? May they not have believed that the observation of benevolence and goodwill towards nations was the policy and duty dictated by the laws of nations, and that, in the exercise of the treaty making power, it was in the power of this Government to conciliate, by acts of kindness and benevolence, those nations with whom they might be disposed to treat?"

CONCLUSION AS TO SO-CALLED RELIEF LEGISLATION.

In short, an examination of the records clearly justifies the conclusion of Mr. Warren:

> "These three statutes—the Codfisheries Act in 1792, the San Domingo Act in 1794, and the Venezuela Act in 1812—the first, based on the Commerce Clause; the second, on the Debt Paying Clause; and the third, merely on a desire to foster our foreign relations—constitute the sole instances of Congres-

sional donation of Government tax revenues, between the year 1789 and the year 1867—a period of seventy-eight years." (Charles Warren. *Congress as Santa Claus,* pp. 20, 21.)

That they were not recognized as based on an acceptance of the Hamiltonian doctrine is shown by the debate in 1827 on the bill for the appropriation for sufferers by fire at Alexandria in the District of Columbia. This Bill was enacted but the opinion was expressed that its constitutionality "rested solely on the fact that the city to be relieved was within the District over which Congress had exclusive jurisdiction. Without the limits of that district, he would not view such a relief as constitutional:" (See speech, Burges, *Congressional Debates,* Vol. III, p. 752).

Opposition was made on the ground that it involved a mere donation of money.

Mr. Rives said,

> "According to the broadest construction which had ever been put on this clause (the welfare clause), it justified no appropriation of the public money but for some purpose connected with the common defence and general welfare of the Union. For his part, said Mr. R., he had always thought that these general terms were limited and defined by the subsequent enumeration of specific powers granted to Congress, and that we could not legitimately vote away the public money but in execution of some of the powers so granted." (*Congressional Debates,* Vol. III, p. 758.)

ROADS AND CANALS.

We have shown the situation confronting the country with respect to the necessity for roads and canals to

develop the vast western territory, to provide military protection, and to provide for intercourse between the States newly created in the West with the Eastern seaboard States.

In 1802, in the Act authorizing the admission of Ohio as a State, it was provided that one twentieth part of the net proceeds of the lands in Ohio sold by Congress should be applied to laying out and making public roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State and through the same, such roads to be laid out under the authority of Congress with the consent of the several States through which the road should pass. (2 Sts. 173, 175). This was on condition that the State exempt from taxation for five years, all public lands in the State sold by Congress. (*Ibid.*) On March 29, 1806, an act was passed providing for the survey and construction of the Cumberland road from Cumberland, Maryland to Ohio. Thirty thousand dollars was appropriated, to be paid out of the fund created from the sale of public lands in Ohio. Thereafter other sums were appropriated, payable out of the fund either immediately or ultimately. (1811, $50,000, 2 Sts. 661; 1812, $30,000, 2 Sts. 730; 1815, $100,000, 3 Sts. 206; 1825, $150,000, 4 Sts. 128.) It was not until 1827 (4 Sts. 228) that money was appropriated for the Cumberland road without providing either that it should be paid, or repaid, out of the five per cent fund. Provision was made for surveying or laying out certain other roads, largely interstate or situated in the territories or on the public domain. Small appropriations in some cases were made out of the general funds for expenses.

JEFFERSON'S MESSAGE TO CONGRESS, 1800.

Jefferson in his annual message of December 2, 1806 referring to the growing surplus in the treasury, re-

marked that it would be inadvisable to reduce duties since they were laid largely on luxuries and expressed the wisdom of applying the surplus to "public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers". (James D. Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 409.) He recommended an amendment to the Constitution to permit such application "because the objects now recommended are not among those enumerated in the Constitution", (*Idem.*, p. 410).

MADISON'S MESSAGE TO CONGRESS, 1815.

In his message to Congress of December 5, 1815, Madison spoke of the great importance of "establishing throughout our country the roads and canals", which he referred to as "facilities for intercommunication in bringing and binding more closely together the various parts of our extended confederacy." He added that "any defect of constitutional authority which may be encountered can be supplied in a mode which the Constitution has providently pointed out." (*Idem.*, pp. 567-568).

MADISON'S VETO MESSAGE, 1817.

On March 3, 1817, Madison vetoed a bill which set apart the bonus and dividend payments from the National Bank (not tax moneys) "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," (*Idem.*, p. 584). He held that the power to regulate commerce did not include the "power to construct roads and canals, and to im-

prove the navigation of water courses." (*Idem.*, p. 584.) He held further that the welfare clause does not grant power to appropriate for such purposes.*

MONROE'S MESSAGE TO CONGRESS, 1817.

President Monroe, in his first message to Congress, December 2, 1817, (*Idem.* II, pp. 11, 18), referring to the vast territory of the United States, said,

> ". . . we can not fail to entertain a high sense of the advantage to be derived from the facility which may be offered in the intercourse between them by means of good roads and canals. . . . A difference of opinion has existed from the first formation of our Constitution to the present time among our most enlightened and virtuous citizens respecting the right of Congress to establish such a system of improvement. . . . Disregarding early impressions, I have bestowed on the subject all the deliberation which its great importance and a just sense of my duty re-

*NOTE. President Jackson subsequently misinterpreted Madison's veto message. (Elliot's *Debates*, Second Edition, Volume IV, pages 526, 527.) It ought to have been apparent that Madison did not believe Congress had power to appropriate money for internal improvements, because the Bill which was vetoed was one which simply appropriated money. (*Annals of Congress*, 14th Congress, Second session, pages 1061-1062.) Madison's letter to Tucker and his letter to President Monroe, both written during the same year (*Letters and Other Writings of James Madison*; published by order of Congress, Volume III, pages 54, 56) make Madison's position perfectly clear, if it was ever really in doubt. That the meaning attributed to the Message by Jackson was not the one placed upon it by Congress, is shown by the fact that in the December following the veto, Barbour of Virginia, introduced a proposal for a Constitutional Amendment to the effect that "Congress shall have power to pass laws *appropriating money* for constructing roads and canals, improving the navigation of water courses." (Italics supplied.) (*Annals of Congress*, 15th Congress, First session, Volume I, pages 21, 22.) When Jackson's Message was sent to Madison by Van Buren, Madison wrote Van Buren as follows:

> ". . . In returning his thanks for this polite attention, he regrets the necessity of observing that the Message has not rightly conceived the intention of J. M. in his veto in 1817, on the bill relating to internal improvements. It was an object of the veto to deny to

quired, and the result is a settled conviction in my mind that Congress do not possess the right. It is not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted. In communicating this result I can not resist the obligation which I feel to suggest to Congress the propriety of recommending to the States the adoption of an amendment to the Constitution which shall give to Congress the right in question."

COMMITTEE'S REPORT AND DEBATES ON MONROE'S MESSAGE, 1817.

This part of the President's message was referred to a committee, of which Mr. Henry St. George Tucker of Virginia was chairman, which made a lengthy report which was the subject of several days' debate in the House. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, pp. 1114-1250, and see, 1283-1312; Vol. II, 1313-1400.) Every possible view was expressed as to the

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Congress as well the appropriating power as the executing and jurisdictional branches of it. And it is believed that this was the general understanding at the time, and has continued to be so, according to the references occasionally made to the document. Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others." (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, page 88.)

What Madison undoubtedly meant was that the Federal Government could accomplish almost as much by the appropriation of money as it could by the exercise of legislative power, and consequently to concede Congress the appropriating power with the breadth claimed, would be to frustrate the intention of the framers, to create a government of limited powers. Other statements of Madison show that that is what he thought, *eg.* The speech on the Codfisheries Bill. (*Annals of Congress,* Second Congress, pages 386, 388, 389), Letter to Stevenson, and supplement to that letter (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, pages 126, 128, 134, 135, 137, 138).

powers granted Congress in this respect. A reading of the debates gives a clear idea of the confusion of mind and the different points of view existing at this time on the powers of Congress in respect to interstate commerce, military defense and navigation.

The committee's report defends the right of the United States to construct roads and canals necessary for interstate communication and military purposes, at least with the assent of the States in which they are situated. Congress, the report says, is expressly authorized "to make all laws necessary and proper for carrying into effect" its powers. The report contends that the right to construct such roads and canals is "necessary" to carry out the powers expressly granted. The only question is whether such construction by the United States is "proper" in view of the fact that it would be "an interference with the jurisdiction of the States over its own soil" which might not be "proper" without the assent of the States. In the opinion of the committee, with the assent of the States involved the objection as to its being proper would be removed.

The report then adds that if this construction is not possible, Congress, in its opinion, can apply funds for these purposes under the welfare clause, and that previous action of Congress justifies such application. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, p. 458.)

> "A few of the very great variety of instances, in which the revenues of the United States have been applied to objects not falling within the specified powers of Congress, or those which may be regarded as incidental to them, will best illustrate this remark.
>
> "Thus, it can scarcely be conceived, that, if construed with rigor, the Constitution has conferred the power to purchase a Library, either specifically or as

> a 'necessary' incident to legislation. Still less, perhaps, can the pious services of a Chaplain, or the purchase of expensive paintings for ornamenting the Hall of session, or various other expenditures of similar character be considered as 'necessary' incidents to the power of making laws. Yet, to these and to similar objects have the funds of the United States been freely applied, at every successive session of Congress, without a question as to the constitutionality of the application."

In the debates it was vigorously asserted that Congress had the power without the assent of the States to construct such facilities as roads and canals in order to carry out its powers to regulate commerce, to transport the mails, and provide the necessary facilities for military defense. The evils resulting from lack of communication were pointed out. The United States would be unable to transport its troops or defend its territory without such roads, and the expense which would be incurred in a few campaigns for lack of these facilities would reimburse the entire cost. (*Idem.*, pp. 1126-1128.)

It was vigorously contended that if Congress did not have the power to construct the roads it had no power to appropriate money for such construction.

Mr. Smyth of Virginia said (*Idem.*, p. 1146),

> " . . . It is properly admitted by the select committee, that the clause grants no power but to raise money. The common defence and general welfare are to be provided for, by expending the money raised in the execution of the other powers expressly granted."
>
> "If Congress have greater latitude in making appropriations than in passing other laws, it is not given to them by the Constitution."

In a long carefully reasoned speech, he said (*Idem.*, pp. 1161-1162),

" . . . His idea as to the correct construction of that instrument, was this:—That the common defence and general welfare, were the ends proposed to be attained—the enumerated powers which followed, were the means of attaining them; and that money was the instrument, as far as it was necessary, by which those powers were to be executed. In support of this construction, he would refer the Committee to the forty-first number of the Federalist, in which the question is strongly asked, for what purpose could the enumeration of particular powers be inserted, if these, and all others, were meant to be included in the preceding general powers? There could be but one answer to this question—that the specification was intended to operate as a limitation of the general words which preceded it. If, then, the proposition were correct, that we must look to the enumeration of particulars, for the extent of our powers, we must look to the same source, for the extent of our right of appropriation. For why, sir, was the right of raising money, by taxes, given us? He would answer, that money was, to the body politic, what blood was to the natural body. It gave to it its life and vigor, and enabled it to perform its functions. The power of raising it, then, was given to us, as he had already remarked, as the instrument by which we were enabled to execute our other powers. What were they? Those which were enumerated, and the necessary incidents which they involved. . . . Unless, then, the application of money shall be construed to extend to the objects of the specified powers, and the necessary incidents only, the Constitution will be chargeable with the palpable inconsistency of intending to impose limitations upon us, and at the same time furnishing us, by means of

the tax-laying power, with an instrument, by which we may, at pleasure, thrown off those very limitations."

It was finally resolved by very close votes (*Idem.*, p. 1249), (1) that Congress has power to appropriate money for the construction of post roads, military and other roads, and of canals and for the improvement of water courses; (2) that Congress has power to construct post roads and military roads; (3) that Congress has power to construct roads and canals necessary for commerce between the States; (4) that Congress has power to construct canals for military purposes. The resolution "that it is expedient that the sum to be paid to the United States under the 20th section of the Act to incorporate the subscribers to the Bank of the United States, and the dividends which shall arise from their shares in its capital stock, shall be constituted as a fund for the construction of roads and canals," was decided in the negative, ayes 72, noes 73.

MONROE'S VETO OF CUMBERLAND ROAD BILL, 1822.

President Monroe on May 4, 1822 vetoed a bill for the Cumberland Road because it provided that the United States should have the power to establish and collect tolls and generally have jurisdiction over the road. He held that the powers granted the United States did not include the power to have jurisdiction over property situated in the States even though constructed for interstate purposes, post roads, military roads, or otherwise. He transmitted with his veto a statement of his views in which he advocated the Hamiltonian view, namely, that money could be appropriated for these purposes so that the United States would be able to see that these facilities were provided, but that Congress could exercise no jurisdiction over their construction or over the roads after

they were constructed. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, p. 142.)

We have not space to continue a detailed examination of action by Congress or the attitude of the Executive. It may be interesting, however, to refer briefly to a few later presidential messages and vetoes.

PRESIDENT JACKSON'S VIEWS.

President Jackson held that Congress could not control or take jurisdiction over such improvements "if jurisdiction of the territory, which they may occupy be claimed as necessary to their preservation and use; . . . Although frequently and strenuously attempted, the power to this extent has never been exercised by the Government in a single instance. It does not, in my opinion, possess it, and no bill therefore which admits it can receive my official sanction." (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, pp. 484-485.)

While Jackson apparently believed that the Madisonian doctrine was correct, he felt that precedents for appropriations for these purposes had established the practice and right, but he was opposed to such appropriations in general as a matter of policy.

PRESIDENT POLK'S VETO MESSAGE, 1847.

President Polk in his veto message of December 15, 1847 (*Messages and Papers of Presidents,* Vol. IV, pp. 610, 618-620) referring to the Hamiltonian doctrine, said,

> "The power of appropriating money from the Treasury for such improvements was not claimed or exercised for more than thirty years after the organization of the Government in 1789, when a more latitudinous construction was indicated, though it was not broadly asserted and exercised until 1825."

Refuting President Monroe's advocacy of the Hamiltonian doctrine, he said,

> "But it is impossible to conceive on what principle the power of appropriating public money when in the Treasury can be construed to extend to objects for which the Constitution does not authorize Congress to levy taxes or imposts to raise money."

PRESIDENT PIERCE'S VETO MESSAGE, 1854.

President Pierce in a veto message of May 3, 1854, of a bill providing for a grant of public lands to the several States for the benefit of indigent insane persons, definitely adopts the Madisonian view although the expenditure of tax money was not involved. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 247, 250-252.)

PRESIDENT BUCHANAN'S VETO MESSAGE, 1860.

President Buchanan also supported the Madisonian view in his veto message of February 1, 1860, (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 599, 601) in which he supported the opinion expressed by President Polk in his veto message above referred to of December 15, 1847.

CONCLUSION AS TO PRECEDENTS PRIOR TO CIVIL WAR.

It is clear from the above that not only was there no general agreement in the early Congresses with the Hamiltonian interpretation, but that on the contrary there was violent opposition to the Hamiltonian view. The Savannah relief bill of 1797 was opposed because of opposition to this doctrine, and was defeated apparently on constitutional grounds, and there is not a clear-cut case in any of the early Congresses in which it was adopted. Even when it was sought to be adopted it was usually attempted to be applied to the appropria-

tion of money for matters relating to interstate roads or canals, or roads necessary for military defense, or to develop the public lands; in other words, to matters jurisdiction of which it is now admitted was confided to Congress. The thought really was that these improvements were essential as a means of enabling the powers granted to the United States to be carried out. The objection to having the United States construct the improvements itself was, that it might interfere with the jurisdiction of the States, but it was felt that if money only were appropriated and no control taken, no interference with the jurisdiction of the States could result, so that this objection was removed.

We submit that the advocacy of the Hamiltonian doctrine by those who succeeded Hamilton was another form of stating that the United States had an implied power to appropriate money towards such purposes as interstate communication, military defense, postroads, etc.

We confidently assert that if the broad nature of the powers, which it was later held had been actually conferred by the Constitution upon Congress, had been thoroughly understood, the Hamiltonian doctrine, which was seized upon and advocated principally as a means of aiding in carrying out these powers, would have rapidly been forgotten.

PRECEDENTS AFTER CIVIL WAR.

We have no space to deal with later precedents. A more extended statement is made by Charles Warren, in *Congress as Santa Claus*. They may be divided into the following classifications.

(1) After 1867 donations for the relief of sufferers from disaster, both local and foreign, have occasionally been voted by Congress.

(2) In 1862 a Statute was enacted granting public lands to the States for the establishment of Agricultural Colleges, on conditions laid down by the Government; (Act of July 2nd, 1862, 12 Stat. 503). This Bill had previously been vetoed by President Buchanan; (February 24th, 1859).

Grants of land before this had usually been made for a consideration or they provided some compensation in return, such as an exemption of taxation of other public lands for a period of time, or in the form of some benefit to the remaining Government lands.

This legislation only appropriated land which the Government had power to dispose of or give away as it pleased, and constitutes no precedent for the use of moneys raised by taxation.

Beginning in 1887 distributions were made to the States for agricultural experiment stations, but until 1907 these purported to be appropriated from public land funds and not taxes. (See Charles Warren, *Congress as Santa Claus,* pp. 92-93.)

(3) In the last thirty years there have been several grants made to the States from general funds for special purposes to be administered by the States in accordance with plans laid down by Congress. It was usually provided that the State should contribute to the plan itself. Such is the Shepard-Towner Maternity Bill. These grants are for purposes not concerned with the enumerated powers.

(4) The Agricultural Department was established in 1862; other departments or bureaus have followed. Many of these departments or bureaus are in large part or wholly concerned with matters over which Congress has jurisdiction, such as the Interstate Commerce Commission, Federal Trade Commission, etc. A number like

the Agricultural Department, Labor Department, Public Health Service, etc., are principally concerned, as the Government Brief shows, with collecting statistics, research and diffusing information and advice. The Government has power to collect statistics and to make investigations. Such information may be regarded as necessary in order that proper legislation may be passed, as a thorough knowledge of all business and economic conditions is necessary to wise legislation. It would seem for similar reasons that appropriations for research, are permissible within the Madisonian theory of the welfare clause. When such information has been obtained, the Madisonian theory would not forbid Congress to make it public and useful.

While it is not material in this case, it would seem, therefore, that the Madisonian interpretation does not prohibit the maintenance of these departments and expenditures for most if not all of the purposes for which they were created.

(5) Finally, in the last few years a number of Acts like the present have been passed, definitely appropriating money for purposes outside the powers granted Congress, and sometimes, as in the present case, for the purpose of exercising control of a matter confided by the Constitution to the jurisdiction of the States.

An examination of the legislation from the adoption of the Constitution shows not only a refusal to recognize the Hamiltonian doctrine until after the Civil War, but also that, except for sporadic gifts for relief and a few instances of gifts to the States to carry out certain policies which are not of extreme importance, there has been since that time up to recently comparatively little legislation and that principally within the last thirty years, which has violated the Madisonian doctrine that taxes

can be levied only to pay the debts of the United States, and to provide for the common defense and for such matters of general welfare, as are embraced within the powers conferred upon the United States.

XIII.

THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE DOES NOT AUTHORIZE THE PRESENT LEGISLATION.

Under the Hamiltonian interpretation of the welfare clause Congress has power to tax and apply the proceeds for the purposes comprised within the powers granted Congress and also for other purposes.

But this interpretation does not give Congress the right to tax and apply the proceeds for any purpose it pleases. It has still only a restricted right to tax for the "general welfare of the United States." To hold that "the general welfare of the United States" is broader than the powers granted the United States does not make it all-inclusive. Its scope and limitations must still be defined.

The Constitution expressly denies to the United States any power to control agriculture and confides this authority to the States. We submit that if the United States has the right to apply tax moneys to agriculture, it clearly has not the right to do so for the express purpose and in such manner as to result in the regulation of agriculture, which right was expressly denied it by the Constitution. Otherwise, this vague phrase authorizing the United States to tax to provide for the general welfare would give Congress power to defeat the express intent and provisions of the Constitution.

1. UNDER THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE A RIGHT TO TAX FOR LIMITED PURPOSES ONLY IS GRANTED.

Even were no limitations provided in the Constitution as to the objects for which taxes could be levied, the right to tax would still be subject to certain limitations.

Taxes could only be levied for public purposes. The right to tax like all other powers granted the Federal Government could not be exercised in violation of the due process clause of the Fifth Amendment.

But in this case the right to tax is expressly limited, even under the Hamiltonian view, to levying taxes to be applied for the general welfare of the United States. This phrase, even under the Hamiltonian view, as we shall show below, has distinct limitations.

Mr. Justice Story, one of the strongest advocates of the Hamiltonian theory, says in his *Commentaries on the Constitution* (5th Edition, p. 663), that the true meaning

> ". . . will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. They will then stand thus: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, *in order* to pay the debts, and to provide for the common defence and general welfare of the United States;' that is, for the purpose of paying the public debt, and providing for the common defence and general welfare of the United States. In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects,—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by Congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority."

Again he says (pp. 672-3):

> "A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common

> sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the Constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous . . . . it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power."

Hamilton himself in his famous Report on Manufactures recognized that the purpose must be

> ". . . general and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot." (Hamilton's *Works,* Lodge ed., Vol. III, p. 372.)

Monroe, an adherent of the Hamiltonian view, in his veto of the Cumberland Road Bill on May 4, 1822, (Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 142, 167) said:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their forms, respectively, is there then no limitation to it? Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not."

He continues to say that the purposes must be of general, not local interest, and not a State "benefit."

2. NATURE OF THE POWER TO TAX AND TO APPROPRIATE FOR THE GENERAL WELFARE OF THE UNITED STATES.

Under the Hamiltonian view the taxing power provides for two things: first, the power to tax for certain purposes; second, the right to appropriate or apply the money so raised for those objects for which they may be levied. The former is a legislative power, strictly speaking; the latter not, since it gives no control over any subject matter but merely a right to apply money to the subject matter.

That the right to appropriate is not a power in the legislative sense is the essential doctrine of the Hamiltonians. Otherwise, as they admit, their view could not be sustained. If the right to appropriate money for an object gave the right to regulate or control that object or the subject matter thereof, then if Congress can, as they contend, appropriate money for substantially any purpose beyond the scope of the granted powers, such as agriculture, manufacturing, etc., all that Congress would need to do to enlarge the granted powers would be to appropriate money for some other object and then proceed to legislate in respect to the subject matter thereof and so control it. But this would make the United States a government of practically unlimited powers which the Hamiltonians admit it is not. Therefore it is essential to their doctrine that the power to appropriate be strictly limited to an application of money, and that it give no right whatsoever to legislate with respect to or regulate the subject matter for which the money is appropriated.

Thus Hamilton in his *Report on Manufactures* said, (Hamilton's *Works,* Lodge ed., Vol. III, p. 372)

> "And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce,

> are within the sphere of the national councils, *as far as regards an application of money.*" . . . "*A power to appropriate money* with this latitude, which is granted, too, in express terms, would not carry a power *to do any other thing not authorized in the Constitution,* either expressly or by a fair implication." (Italics ours.)

Jefferson in his opinion on the Bank of the United States (February 15, 1791, 4 Jefferson's *Works,* 524, 525) said:

> " 'To lay taxes to provide for the general welfare of the United States'; that is to say, 'to lay taxes *for the purpose* of providing for the general welfare'. For the laying of taxes is the *power,* and the general welfare the *purpose* for which the power is to be exercised. Congress are not to lay taxes *ad libitum, for any purpose they please;* but only *to pay the debts, or provide for the general welfare of the Union.* In like manner they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose."

Mr. Justice Story strongly supports this view (see *Commentaries on the Constitution,* Vol. I, pp. 717-727).

3. THE POWER TO TAX AND TO APPROPRIATE MONEY FOR THE GENERAL WELFARE GIVES NO AUTHORITY TO LEGISLATE WITH RESPECT TO OR TO CONTROL AGRICULTURE.

The general welfare clause, then, under the Hamiltonian view contains two powers: first, the power to tax for certain purposes; second, the right to appropriate the money so raised for these purposes.

The first power—the power to tax—gives Congress no power to authorize any such regulation of agriculture as is provided for in the present legislation. Such a control of agriculture has no relation whatsoever to the

power to tax. Under that power Congress can designate the object to be taxed, the amount of the tax, and make provision to insure the collection of the tax, and that there be no evasion.

Linder v. *United States,* 268 U. S. 5.
Nigro v. *United States,* 276 U. S. 332.

In *Linder* v. *United States,* which concerned an act providing for taxation of sales of narcotics, the Court said (p. 18):

> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

A restriction of the production of cotton has no relation to the enforcement of a tax on the processing of cotton. The restriction on growing cotton does not in any conceivable way assist in the collection of the tax.

Any right of the United States, then, to restrict the growing of cotton must be derived from the right to "appropriate" the money raised by the tax for the benefit of agriculture.

But the right to appropriate money for the benefit of agriculture gives no right to regulate agriculture. Control over agriculture is not a necessary or a direct result of the right to appropriate money or an indirect result of the exercise of such right.

Assuming that Congress has the right to appropriate money for the benefit of agriculture, we are confronted with the scope of that right. As we have shown above, the Hamiltonians themselves are the first to admit that the right to appropriate confers no power to control or legislate with respect to the subject matter, since if it

did their entire theory would collapse as it would involve giving the United States unlimited powers.

It is clear, then, that if Congress has the right to appropriate money for purposes beyond the scope of its granted powers, this right gives it no right or power directly to regulate by prohibitions or legislate with respect to such matters. We therefore submit that it gives the United States no right to use the power to appropriate for the direct purpose of putting into effect a scheme or plan for the regulation of agriculture or any other local matter the regulation of which was clearly intended by the Constitution to be subject to the exclusive jurisdiction of the States. Otherwise the clause would enable Congress through the right of appropriation to control matters which the Constitution and the Tenth Amendment forbid it to control.

Thus, Monroe, who adopted the Hamiltonian view, said, of the restricted nature of this right of appropriation:

> "But the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States, or in any sense in which power can be controverted, or become a question between the two governments."

The right to appropriate money for an object gives Congress the right to designate the object and to authorize a disbursing officer to pay over such money to the designated recipient. It does not give Congress power to use the appropriation for the purpose of controlling the subject matter to which the money is to be applied.

The use of the appropriation to bring about such control is not necessary to the exercise of the right to appropriate nor a direct or indirect consequence of the exercise of such right.

In the present case the scheme of control or restraint is not an incidental result of the appropriation. On the contrary, the appropriation is incidental to the scheme of restraint. **The restraint is not imposed to enable Congress to make the appropriation. On the contrary, the appropriation is made to enable Congress to carry out the scheme of restraint.**

The Hamiltonians admit that Congress is not authorized by the Constitution to control matters outside the enumerated powers; they only contend that Congress can appropriate money for such other purposes. If, however, Congress can use this power to appropriate in respect to these other matters for the direct purpose of controlling them, then it is clear that the intent of the framers of the Constitution to limit the powers granted to the United States will be defeated by the exercise of the right to appropriate. There are few schemes or regulations in respect to such other matters which Congress, backed by the unlimited power of taxation, could not accomplish by these means. The basic principle of the Constitution would be destroyed. It is clear that the right to appropriate money can give no power so inconsistent with the Constitution.

4. THE PURPOSE OF THE LEGISLATION MUST BE JUDICIALLY INQUIRED INTO.

The Government contends that if we are correct in our contention that Congress is not authorized to tax for the purpose of controlling agriculture, the court can not take cognizance of this purpose, since the motives of Congress can not be inquired into. Therefore the fact that

these taxes are levied for the purpose of regulating agriculture is not a matter which can be inquired into judicially. It seeks to differentiate the *Child Labor Tax case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, on the ground that in these cases it appeared on the face of the legislation that the purported tax was not intended as a tax but as a penalty, a prohibition of certain conduct, and that therefore there was no legislation intended to raise revenue and no proper exercise of the power to tax, while in this case we have a real revenue measure intended to raise money, and therefore the purposes for which it is raised can not be inquired into. It quotes in support of this contention *McCray* v. *United States*, 195 U. S. 27, and *United States* v. *Doremus*, 249 U. S. 86, and similar cases.

The fallacy of the argument is that it leaves out of consideration the fact that the power to tax is a restricted power. Congress can only levy taxes for specific purposes, as we have shown above. The express purpose for which the present taxes are levied is set forth in the act. The question is therefore necessarily raised as to whether this purpose is one for which Congress is permitted under its restricted taxing power to levy taxes.

In the McCray case and the other cases relied on by the Government, the apparent and purported purpose of the tax—to enable the United States to obtain revenue for general treasury purposes—was a proper one. The act on its face was a valid exercise of the power of taxation. The question therefore was whether the court could look beyond the face of the legislation and the fact that it purported to exercise a valid power in order to determine whether the real motive in the minds of the legislators was to raise revenue, as appeared on the face of the act, or was to accomplish some other ulterior purpose. The court held that Congress had authority to

impose a tax on oleomargarine; that the effect on sales of oleomargarine was an indirect result of an exercise of power conferred on Congress and whether the accomplishment of the indirect effect was the motive in the minds of the legislators could not be inquired into.

In the *Child Labor Tax* case and *Hill* v. *Wallace* the court held that although the legislation purported to levy a tax for general revenue purposes, the unlawful and ulterior purpose appeared on the face of the act and did not have to be sought in the minds of the legislators and that therefore it could be taken into consideration.

In the present case not only does the purpose appear on the face of the act, but, furthermore, since a tax can be levied only for certain limited purposes and since the purpose here is stated, it necessarily must be inquired into in order to determine if the tax is within the purposes for which Congress is expressly authorized to tax.

5. LIMITATIONS ON THE PURPOSES COMPRISED WITHIN THE PHRASE "GENERAL WELFARE OF THE UNITED STATES".

We have shown above that the words "general welfare of the United States" restrict the power to tax to purposes comprised within this phrase.

What are the limitations? It is not necessary for the purposes of this case to determine them exactly. It was said with reference to the limitations on the power to control interstate commerce in *Schechter* v. *United States* (*supra* p. 546), "the precise line can be drawn only as individual cases arise, but the distinction is clear in principle." It is not necessary here to draw a line applicable to every individual case. What is needed is to lay down general principles. Their application to the present case will clearly appear.

The following limitations we submit must be recognized:

(a) Hamilton himself and all the Hamiltonians admit that the purposes must be general, not local (see *supra* p. 164).

(b) The "general welfare of the United States" can not be the general welfare solely of some other country or solely of people other than citizens of the United States. Their welfare would not be the welfare of the United States. Thus, Mr. Justice Story says in his *Commentaries* (Vol. I, pp. 672-3):

> "If the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous (as, for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes), it would be wholly indefensible upon constitutional principles."

(c) The tax must be for a public as distinguished from a private purpose; otherwise, it would violate the due process clause of the Fifth Amendment.

(d) It can not be for an illegal purpose which includes a purpose which is in violation of or repugnant to the Constitution.

This latter limitation clearly invalidates the present legislation.

However broadly we may interpret the phrase "general welfare of the United States," we cannot interpret it as permitting the levying of taxes for an illegal purpose or one which violates the Constitution. Such purposes can not be held to be for the welfare of the United States.

However absolute the right to appropriate, it is subject to this necessary qualification. As Mr. Justice Holmes said in *Fidelity and Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434:

> "But it has been held a great many times that the most absolute seeming rights are qualified and in some instances become wrongs. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

To put an extreme example, it is clear that a tax could not be legally levied for the purpose of paying the proceeds to such persons as murdered their next door neighbors.

In *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, where the question of whether the right of a State to exclude a foreign corporation could be exercised merely because the corporation had resorted to the federal court, Mr. Justice Bradley (in a dissenting opinion now the law) said:

> "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

6. AN APPROPRIATION MADE FOR THE DIRECT PURPOSE OF RESTRICTING OR INTERFERING WITH OR REGULATING AGRICULTURE IS REPUGNANT TO THE CONSTITUTION, VIOLATES THE TENTH AMENDMENT AND IS ILLEGAL.

(a) *This legislation effectuates a direct control over or intermeddling with agriculture.*

We have shown that it is a basic principle of the Constitution that the States should retain exclusive control of their local affairs and that agriculture is fundamentally and essentially local and subject exclusively to State control.

It was said in the *License Tax Cases,* 5 Wall. 462, 471:

> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers granted to the legislators."

Congress has no authority to interfere or intermeddle with such local affairs. Mr. Justice Holmes in his dissenting opinion in the first child labor case (*Hammer* v. *Dagenhart, supra*) said (p. 277):

> "The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it."

In his opinion Congress in that case was only exercising a power over interstate commerce expressly conferred upon it, and therefore the effect on the local affairs of the States he held was an indirect consequence of legitimate action.

In the present case there can be no question but that the "intermeddling" is direct. We have not here a case where Congress is exercising a power like the power to regulate interstate commerce and the intermeddling with local affairs is an indirect or incidental result thereof. Here we have legislation designed and intended for the sole purpose of intermeddling and controlling. The tax is authorized for the sole purpose of providing funds to carry out the scheme of intermeddling and controlling. The appropriation is authorized solely to enable the scheme to be carried out and the Secretary of Agriculture is authorized to disburse the funds only to those agreeing to or who do carry out the scheme.

The right to tax, as we have shown above, gives no power to legislate for such a scheme. The sole question is whether the right to appropriate money for the "general welfare of the United States" gives a power thus directly to intermeddle with and control local affairs.

The right to control agriculture was denied the United States by the Constitution and confided to the States. To hold that the right to apply money towards agricultural purposes gives it the right to apply money in such manner as to effect control of agriculture would be to hold that the Constitution is wholly inconsistent, since it gives Congress power to control a matter which admittedly it denies it the right to control. Such an interpretation cannot be supported.

(b) *The so-called voluntary character of the control.*

The Government as we understand it does not contend that it has the right under the welfare clause by direct legislation to intermeddle with agriculture or to restrict production. Its contention is that it can under its authority to appropriate money accomplish its scheme of control by inducing the farmers to comply therewith, or

by imposing conditions on the recipients of its appropriations requiring conformity therewith. This method it styles voluntary, and contends that it turns what would be illegal if accomplished by direct control into a legal scheme which is for the general welfare of the United States.

We deny that the plan is in any legal or true sense voluntary; it is a scheme induced by coercion. But even if it were voluntary and the Secretary of Agriculture could obtain the agreements of sufficient persons to carry out the scheme without making any payments to them to induce them to agree, or without any coercion, the scheme, if authorized by the United States, would still be unlawful.

A combination to restrain interstate or intrastate commerce is not lawful because the parties enter into it willingly and without inducement or coercion. Practically all combinations or plans to restrain commerce are voluntary.

A State could not authorize its Secretary of Agriculture to create and enter into a combination to restrict competition or fix prices of agricultural commodities in interstate commerce. The fact that the other parties to the plan enter the combination voluntarily would not be a defense. The State could not authorize such a combination, even though voluntary, because it would be an interference with interstate commerce, control of which by the Constitution is confided exclusively to the hands of Congress. The question of whether the agreement to carry out the plan was or was not voluntary would be immaterial.

Equally, the United States cannot authorize and create a combination to control the production of agricultural products within a State, even though the individuals entering the combination do so voluntarily, because this

is an interference with a local matter the control of which under the Constitution is confided to the states.

Such an interference with local affairs by the United States is permissible only where it is expressly authorized by the Constitution or is a direct or incidental result of the legitimate exercise of a power granted the United States by the Constitution.

(c) *Compliance with this scheme is not voluntary.*

As shown above it is immaterial whether or not compliance with the scheme of control is voluntary or coerced. It may be well to point out, however, that in the present case compliance with the scheme cannot be called voluntary in any legal or practical sense.

The cotton grower is offered his choice of not complying, in which case he will not receive the benefits to be paid by the United States, or of accepting and restricting his production and receiving the benefits. The amount of benefit offered is intended to be sufficient to make it necessary or at least advisable for him to accept as a practical matter. This is one of the principal purposes of the legislation as shown above (*supra* p.). If the cotton grower does not accept, he will receive less for his crops; others receiving the benefits may be able to undersell him, and the consequences may be serious, including not only a loss of profits, but possible bankruptcy and the loss of his farm. This is coercion.

In *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583, which case we consider more fully below (*infra* pp. 194-197), the question was whether the State having the right to permit or prohibit the use of the highways could issue a permit to use to a trucking company conditioned on its acting as a public carrier. The court denied this right and said:

"If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden" (p. 593).

In *Union Pacific R. R. Co.* v. *Public Service Com.*, 248 U. S. 67, the Union Pacific Railroad applied for a certificate of authorization of an issue of bonds secured by a mortgage on its entire line. Only a small portion of its property was in Missouri. A fee of $10,962.25 was charged for the certificate by the Missouri commission, which was a statutory fee fixed by a percentage on the total issue contemplated. It was held that this was an unlawful interference with interstate commerce. The commission contended that the railroad company was under no obligation to get the certificate, and, having applied for it, was estopped to decline to pay the fee. Mr. Justice Holmes held that whether the certificate was necessary or not, it was a commercial necessity in order to enable the railroad properly to sell its bonds. He said (p. 70):

"Of course it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made accord-

ing to interest does not exclude duress. It is the characteristic of duress properly so called."

(d) *What constitutes an illegal interference with local matters?*

As in the case of interstate commerce the precise line between what constitutes illegal interference with the State's jurisdiction and what does not, can most wisely be decided as individual cases arise for decision. Only the general principles need here be laid down and their application to the present case.

(1) Appropriations for purposes over which the State has no control can hardly be called an interference with the State's authority.

On fundamental principles and under the due process of law clause of the Fourteenth Amendment no person can be arbitrarily or unreasonably interfered with in the exercise of his fundamental rights to life, liberty, property.

These rights include the right to devote money to scientific research and investigation, the right to apply money to the promotion of education in accordance at least with methods which do not violate accepted public policy, the right to give property away to relieve suffering or merely to benefit the recipient. None of these acts if performed by an individual could be restrained or controlled by the State. Such control would be arbitrary and would violate the due process clause. They can hardly, therefore, be held an interference with the State's rights or an illegal intermeddling with local affairs, since the State has no jurisdiction over them, and no right to control them.

It may be that other action which has always been recognized as conferring a public benefit and to be en-

couraged as promoting well recognized public policy ought also to be included as not interfering with the State's authority, even though subject to some theoretical control by the State, until the State takes affirmative action and determines otherwise, just as certain matters largely of local concern which affect interstate commerce have been held subject to local legislation until Congress legislated. It is not necessary to decide this in the present case.

(2) Payments made directly to a State, accepted by it and used by it for some plan which it adopts and carries out, may be unconstitutional for some other reason, but would not be unconstitutional on the ground that they are an interference with the State's authority over local matters.

On the other hand, attempts by the United States to directly control matters itself, which are definitely subject to control by the States, and ordinarily are so controlled, are clearly an interference with the State's authority. Especially is this so when the States have by their constitutions, laws or public policy, held that the attempted action is illegal, criminal or against public policy. Since it is not only the exclusive right but the duty of the State to promote the public welfare relating to its internal affairs, and to regulate and control them so far as it deems this advisable, the United States has neither the duty nor authority to attempt directly to control such matters.

7. PREVIOUS LEGISLATION BY CONGRESS AFFORDS NO PRECEDENT FOR THE PRESENT LEGISLATION.

The Government lays great stress on the established practice of Congress. We have shown above that the precedents which support the Hamiltonian doctrine are comparatively recent, and are of no weight in determining

the Constitutional authority of Congress. We shall here show, that none of this legislation relied on by the United States constitutes an interference with the authority of the States in accordance with the principles laid down above and, therefore, constitutes no precedent for the present legislation.

The most that can be said of the precedents is that they show the practice of Congress to appropriate for matters beyond the scope of the enumerated powers. They do not show instances like the present of appropriations made for the direct purpose of carrying out plans to interfere with the authority of the States in violation of the Tenth Amendment and the basic principles of the Constitution.

The so-called precedents may be divided into the following classes:

(a) Appropriations made for matters not in any way related to the internal affairs of the States and which therefore can not constitute any interference with the State's authority, are not in any way repugnant to our system of dual sovereignties or to the Tenth Amendment.

These include the example cited by the Government of the grant by the United States of $50,000 in 1897 to destitute Americans in Cuba, the grant to aid sufferers from earthquake in Japan in 1925 and other grants for similar purposes. These grants it would seem might be justified as proper means to create good will in our foreign relations, etc., but in any event they do not interfere with the State's authority.

(b) Grants for what may be termed charitable or beneyolent purposes, including the relief of distress, education, scientific investigation, etc.

While such appropriations or gifts may relate to internal affairs of the States, yet as we have shown above (if we accept the Hamiltonian theory that the United States can tax for objects beyond the scope of the enumerated powers) they can not be deemed an interference with the State's authority. If these gifts or appropriations had been made by an individual, the State could not control or prohibit them as it would violate the due process clause for a State to restrain a citizen from relieving distress or from educational or scientific research or applying funds for such purposes. Such an application of money, therefore, since not subject to the jurisdiction or control of the States, can not be deemed an invasion of a State's rights.

Under this head are included practically all of the so-called precedents cited by the Government in its brief. They include the following:

(1) Relief of distress due to catastrophe.

Under this head are cited grants "to aid sufferers from earthquakes, Indian depredations, fires, war or famine, tornadoes or cyclones, yellow fever, grasshopper scourges and floods."

These are all purely charitable grants of the character to which the Red Cross devotes its funds.

(2) Health.

Under this head are cited grants for studies in sanitary engineering and rural sanitation, the dissemination of health information, research into the nature and cause of disease, studies designed to promote the safety and health of miners, studies in educational methods, gifts to aid educational institutions and projects, and research and appropriations for the dissemination of information.

Here again we have purely benevolent grants which the States could not prohibit or control.

(3) Social Welfare.

Under this head are cited appropriations to "acquire and diffuse among the people of the United States useful information on subjects connected with labor," appropriations "to investigate and report upon all matters pertaining to the welfare of women," and to publish the results of such investigations, and to investigate and report "upon all matters pertaining to the welfare of children and child life."

Here again are benevolent grants which the States could not prohibit or control.

(4) Agriculture.

Under this head are cited appropriations for the collection of agricultural statistics, distribution of seeds, agricultural experiments and education, the study and eradication of animal diseases, investigation of plant and tree diseases, the study of "plant nutrition and soil fertility."

Here again are purely benevolent purposes.

There is not one of the foregoing matters which a State could constitutionally prohibit or regulate. They constitute no invasion of the State's authority. How strikingly they differ and how weak is the Government's case when they are cited as authority for the present gigantic combination to plow up ten million acres of growing cotton, eliminate forty per cent. of the total land planted in cotton, and to restrict other crops in proportion by agreements induced by benefit payments and entered into with millions of farmers in the country, such contracts being in violation of the constitutions, laws and public policy of the states.

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(5) Certain grants made to the States to be used by the States in carrying out plans which they authorize and execute.

These appropriations are certainly not an invasion of the rights of the States.

These instances of grants cited by the United States therefore afford no precedent whatsoever for the present legislation.

8. SUMMARY OF THE PRINCIPLES INVOLVED AND ITS APPLICATION TO THE PRESENT CASE.

Under our constitutional system neither a State nor the United States can directly interfere, intermeddle with or control matters which under the Constitution are within the exclusive control of any other sovereignty, state or national.

Each sovereignty can exercise the powers which are exclusively conferred on it. Any effect which the normal and proper exercise of such power may have on the affairs of other sovereignties, state or national, is permissible. Such effect is held to be indirect and incidental to the exercise of a legitimate power.

But no direct interference, that is, no interference which is not the incidental result of the exercise of an admitted power, is permitted.

Furthermore, while motives of legislators cannot ordinarily be examined into, on the other hand if the legislation shows on its face that although purporting to be the exercise of an admitted power it is not an exercise of such power for its own sake, but is for the sole purpose of accomplishing something within the control or jurisdiction of another sovereignty (state or national), it will be held illegal. Furthermore, since taxes can only be levied for specified purposes, the purpose set forth in

its legislation must be inquired into, to see if it falls within the authorized purposes.

Still further, it makes no difference if such interference is accomplished by direct action or by indirection or with the voluntary assent of citizens of the sovereignty whose rights are invaded. The principle is applied that:

> "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." (*Fairbank* v. *United States,* 181 U. S. 283, 294.)

This is "the well established rule." (*Macallen* v. *Mass.,* 279 U. S. 620, 629.)

These principles are applied because they are necessary to preserve our system of dual sovereignties, the basic principle upon which our Constitution and its system of government is founded. If this principle could be defeated by direct or indirect assault, the sovereignty of our individual governments would be impaired or destroyed and the system devised by the Constitution would collapse.

A further principle is applied to insure the preservation of the system. Where two powers possessed by two sovereignties (state and national) which considered apart from other provisions of the Constitution, or, if taken literally, would be in apparent conflict, they are interpreted in accordance with the spirit and intent of the Constitution as a whole; that is, a "practical construction" or interpretation is applied which "will not nullify or substantially impair" either power and will permit so far as possible each government to "administer its affairs within its own sphere . . . free from undue interference by the other." (See *supra* pp. 48, 49.)

Application of these principles to the present case.

In the present case we have under the Hamiltonian theory on the one hand a power to tax for certain purposes, namely, to pay the debts and to provide for the common defense and for the general welfare of the United States, and to appropriate or apply the proceeds to such purposes.

We have, on the other hand, the basic principle of the Constitution which requires that States should have exclusive control over local affairs which includes agriculture, and the Tenth Amendment which emphasizes this principle and expressly provides for such control by the States.

We have before us legislation, the sole and direct purpose of which by its terms is to directly restrict and thus control the production of agricultural commodities on a vast scale, and thus intermeddle with and control a matter of exclusive State jurisdiction.

We have, in addition, the circumstance that if the principle of this legislation is recognized as legal, Congress can cause the adoption in a State of practically any policy with reference to its internal affairs which Congress desires to put into effect, provided only Congress is willing to offer sufficient benefits to induce or coerce its acceptance, and therefore, if the principle is recognized, it results in Congress having power for practical purposes to impair if not destroy the authority of the States over their local affairs.

To hold that the welfare clause permits Congress to appropriate money for the express purpose, and in such manner as to control agriculture in the States, would mean that the framers of the Constitution, having expressly denied to Congress the right to control agri-

culture, gave Congress, nevertheless, by the application of money, the very right it had expressly denied it.

We must also consider that the asserted right of the United States to use the power to appropriate money for the purposes of controlling matters which it has no authority to control directly, and thus to accomplish a purpose clearly not intended by the Constitution, must be supported on the ground that such a purpose can be regarded as promoting "the general welfare of the United States."

Chief Justice Marshall in *Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 629, said:

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Under these circumstances can there be any doubt as to the proper interpretation of the clause we are now considering, or that the right to appropriate the proceeds of taxes for the general welfare of the United States can not include the right to appropriate for the direct purpose of impairing or interfering with the authority of the States over their local affairs?

9. CASES WHICH FULLY SUSTAIN THE PRINCIPLE ABOVE STATED.

THE CHILD LABOR CASES.

The first Child Labor case, *Hammer* v. *Dagenhart*, 247 U. S. 251, establishes the foregoing principle completely and for this reason we ask the indulgence of the court to analyze it at some length. The principle laid down in the dissenting opinion in that case delivered by Mr.

Justice Holmes and concurred in by three other justices, also sustains the illegality of the present legislation.

In the Hammer case Congress passed legislation forbidding the transportation in interstate commerce of manufactured goods produced in any factory in which within thirty days of shipment children under certain ages were employed. The court said:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States" (pp. 271-272).

The court therefore held the Statute unconstitutional and in the course of its opinion said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution" (pp. 273-274).

So, in the present case, the right of Congress to appropriate money for purposes related to the general welfare of the United States was clearly not intended to enable Congress to control matters which the States are exclusively authorized to control in the exercise of their police power over agriculture.

The court further said, at pages 275, 276:

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. (Cases cited.) To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. . . .

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority."

Mr. Justice Holmes in his dissenting opinion said (p. 277 *et seq.*):

"The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of

direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

"The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid, it is only upon some collateral ground. The statute confines itself to prohibiting carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. . . .

"The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. . . .

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

We wish first to point out the similarities between the Hammer case and the present case.

In the Hammer case we have legislation by Congress forbidding the transmission in interstate commerce of certain goods. The purpose as shown by the act is to restrict or prohibit child labor in the States. Such labor was not, however, prohibited directly. It was sought to be controlled by offering a privilege or benefit —namely, the right to ship in interstate commerce—to those who conformed. Each manufacturer was free to conform or not as he pleased. If he did not conform, he did not receive the privilege. The majority of the court held that the effect on child labor as shown by the act was the direct purpose, and therefore the direct effect of the act, and not the indirect effect of the lawful exercise of an admitted power since the exercise of such power solely for an ulterior purpose, was an unlawful exercise of the power.

In the present case Congress undertakes to use the power of appropriating money for the express, sole and direct purpose of restricting and thus controlling agriculture. It offers a privilege—a grant of money—to those who conform to its plan and denies it to those who do not conform. The cotton grower is free to conform or not as he pleases.

It is clear that under the principles laid down in the majority opinion in the Hammer case the exercise of the right to appropriate for the direct purpose of effecting this unlawful result must be held invalid.

The present case is, however, much stronger than the Hammer case. Here we have no purported exercise of a legislative power, the indirect but lawful effect of which might be to regulate agriculture. We have here only the right to appropriate. **The effect on agriculture could not possibly be deemed the indirect effect of the right to**

appropriate money. The money was appropriated for this express purpose, and the effect to be produced was the express and direct effect of the appropriation and could not by any possibility be called its indirect effect (see *supra* p. 175).

For this reason the present legislation is also unlawful under the principle laid down in the minority opinion.

Mr. Justice Holmes said that direct intermeddling with methods of production in a State is unlawful. In the Hammer case he said Congress was merely exercising its admitted right to regulate interstate commerce, which included the right to prohibit transportation in interstate commerce, and that, such being the case, the motive or real purpose of Congress would not be considered even though it was apparent on the face of the act.

In the present case, however, he could not say this. Here we are dealing with an appropriation and not a legislative power. An appropriation can only be made for a purpose. Congress can not merely appropriate money; it must necessarily state the purpose of the appropriation. The validity of the appropriation depends on the purpose and hence the purpose must be examined into. Further, the purpose of the appropriation determines necessarily its direct effect. Thus, in the present case Mr. Justice Holmes would clearly agree that the purpose must be inquired into and that the direct purpose and effect sought to be accomplished was the intermeddling with agriculture.

BAILEY v. DREXEL.

In *Bailey* v. *Drexel*, 259 U. S. 20, the second child labor case, Congress imposed a tax on the profits of those employing child labor with an exception in case of ignorance by the employer of such employment.

The court held that the so-called tax was imposed to prohibit the employment of children and that this motive should be taken into account since the law showed on its face "the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation;" (p. 42). * * * "The so-called tax is a penalty to coerce the people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution" (p. 39).

Here we again have legislation offering a privilege, namely, an exemption from taxation to those who conform to the scheme, they being free to conform or not as they please. There is no direct prohibition. Action is voluntary in the same sense that it is voluntary in the present case. Yet the court calls the effect coercion and the legislation unlawful as an invasion of the rights of the States.

HILL v. WALLACE.

In *Hill* v. *Wallace*, 259 U. S. 44, the same principle was applied in holding the Future Trading Act unconstitutional which imposed a tax on contracts for the sale of grain for the purpose, as shown on the face of the act, of regulating the business of grain boards of trade.

In *Hill* v. *Wallace* the court distinguished *McCray* v. *United States* (*supra*) and similar cases on the ground that "in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law detailed regulation of a concern or business wholly within the police power of the state with a heavy exaction to promote the efficacy of such legislation."

CASES INVOLVING THE RIGHTS OF STATES TO GRANT OR WITHHOLD PRIVILEGES IN ORDER TO OBTAIN COMPLIANCE WITH MATTERS BEYOND THEIR JURISDICTION.

There are numerous cases applying this same principle to State legislation and holding that a State, although it has the absolute power arbitrarily to withhold or grant a privilege, can not use such power to induce the doing of some act which the State can not control or make the grant to a person or its withdrawal of the privilege from the person conditioned on such person conforming to action which the State can not directly control because such control is within the jurisdiction of another State or of the United States, or is a control which cannot be exercised by the State because of a constitutional prohibition. The fact that the person whose conduct is influenced or controlled is free to conform to what the State wishes or not as he pleases is no defense.

The States being as sovereign in respect to the matters committed to their charge, as is the United States, the principle of their right thus to control matters constitutionally beyond their jurisdiction is equally applicable to the right of the United States to control matters beyond its jurisdiction. In *Worcester* v. *State of Georgia,* 6 Peters 515, 570, the court said:

> "The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power."

The principle is very clearly stated in *Frost Trucking Co.* v. *R. R. Commission of Cal.,* 271 U. S. 583. The

question in that case was whether the State had power to withhold a permit to use the highways from a private contract trucking company unless it became a public carrier. The court held that a private carrier can not, consistently with the due process clause, be converted against his will into a common carrier by the State. The question therefore was whether the State, by reason of its power, which the court for the purposes of the case admitted, of prohibiting the use of the highways, could so bring about the result which it could not accomplish by direct legislation. The court said (p. 593 *et seq.*):

> "There is involved in the inquiry not a single power but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter separately and substantively must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring the surrender which, though, in form voluntary, in fact lacks none of the elements of compulsion. . . .
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state,

having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence."

In this case we have what is regarded as an absolute right by the State to prohibit or permit the use of its highways. We have also the principle that a State can not compel a private contract carrier to become a public carrier. The State seeks, however, to induce the contract carrier to become a public carrier by offering it a privilege which the State has the right to grant or withhold. The contract carrier is free to accept or not as he pleases. There is no constitutional restriction against his becoming a public carrier. The decision is entirely within his control. But this case holds that a State can not use its power, however absolute it may be, for the purpose of bringing about a result which it has no jurisdiction directly to order or control.

So in the present case the United States is attempting by the use of the right to appropriate money, to bring about a restraint of agriculture which is a subject matter entirely beyond its right to control and the control of which is entirely within the jurisdiction of the States.

In the Frost Trucking Co. case the court quotes with approval the dissenting opinion of Mr. Justice Bradley in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, which is now the law, as follows:

"Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions on their doing so * * *.

"The whole thing, however free from intentional disloyalty, is derogatory to the mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance" (pp. 595, 596).

In *Looney* v. *Crane Company,* 245 U. S. 178, it was held that although the State had an absolute right to permit or refuse to permit a foreign corporation to do business in the State, it could not issue a permit only on condition that the grantee would pay a license tax for such permit based on its assets outside the jurisdiction of the State which therefore the State could not directly tax. The foreign corporation was free to accept the permit or refuse it. By a mere money payment it could obtain the permit. It was held, however, that the State could not use its right or privilege, however absolute, to accomplish a result which it could not accomplish directly because constitutionally beyond its jurisdiction.

In the Looney case the foreign corporation to obtain the privilege was only required to pay a comparatively small sum of money which it was entitled to pay if it chose. The public generally was not affected by the payment. In the present case the farmer in order to obtain the privilege is required to join a gigantic combination to drastically restrict production, which violates the Constitution, laws and public policy of most if not all of the States.

In *Terral* v. *Burke Construction Co.*, 257 U. S. 529, the same principle was applied in holding that the State could not revoke a permit to do business merely because the foreign corporation had resorted to the federal courts. The State had the absolute right to withdraw or withhold the privilege. The corporation had the right to resort to the federal courts or not as it pleased. It could not be induced, however, by the State to give up its exercise of this right by conditioning the benefit on its not exercising its right, because the control of whether it resorted to the federal courts was beyond the jurisdiction of the State.

In *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, the principle was applied to a matter of trivial importance. In that case a statute of the state of New Mexico made it unlawful for any insurance company to pay a fee to a person not a resident of New Mexico for placing insurance on property in New Mexico. It was provided that the permit to do business of a company paying any such fee should be withdrawn. Here again the court held that the legislation was unconstitutional on the ground that although the use of its legislative right to withdraw a privilege was within the State's power to grant or refuse, it attempted to regulate a matter outside its jurisdiction. Mr. Justice Holmes speaking for the court said (p. 434):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania*, 268 U. S.

473. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358. *Badders* v. *United States,* 240 U. S. 391, 394. *United States* v. *Reading Co.,* 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646."

In this case the right sought to be controlled was not subject to state control solely because it was an act performed outside the jurisdiction of the State. It was an act of comparatively trivial importance which did not involve any real question of public policy. The legislation was unconstitutional because the State had no right by the exercise of its undisputed power to admit or exclude, to attempt to control this trivial matter outside of its jurisdiction.

SUMMARY OF THE FOREGOING CASES.

The foregoing cases conclusively establish the principle that although a sovereignty (state or national) has an absolute right to grant or withhold a privilege it can not grant or withhold such privilege for the purpose of inducing action which is beyond its jurisdiction to con-

trol, either because such control is confided to the jurisdiction of another sovereignty, or because such control is prohibited by a constitutional limitation.

The present case falls clearly within this principle. The right to appropriate is used by the United States for the direct purpose of inducing action which is beyond the jurisdiction of the United States and is within the exclusive jurisdiction of the States.

OTHER CASES ESTABLISHING ANALOGOUS PRINCIPLES.

It is a fundamental principle of constitutional interpretation that any action by the United States or the States which is repugnant to the intent of the Constitution is unconstitutional.

Thus, although the United States, by the express wording of the Constitution, is given an unlimited right to lay excises for its governmental purposes in respect to any subject matter whatsoever, without any limitation, it has been held that by implication this broad and apparently unlimited right is subject to the restriction that the United States shall not tax the instrumentalities of the State, since by doing so it could interfere with or destroy the State or prevent it from accomplishing its proper functions, which would be repugnant to the spirit and intent of the Constitution.

The Collector v. *Day*, 11 Wall., 113.

In other words, the broadest kind of right expressly granted to the United States by the Constitution is qualified and must be limited where its exercise would be repugnant to the intention of the Constitution.

In the present case, on the same principle, it is clear that if the United States, as the Government contends, has the unqualified right to appropriate tax money for any purpose it pleases, such right by implication must

be restricted where its direct exercise is used to control a matter expressly reserved to the States.

Numerous other cases hold that a State, although acting within its apparent field of power, cannot use such right to discriminate against Interstate Commerce. Thus, the Inspection Laws of a State which are exercised under the power to protect public health, cannot be so exercised as to discriminate against imports from another state.

Minnesota v. *Barber,* 136 U. S. 313.

Bremmer v. *Redman,* 138 U. S. 78.

Voight v. *Wright,* 141 U. S. 62.

On the same principle, in the present case, if the United States has the unqualified right of appropriation, it cannot be so exercised as directly to exert control over agriculture which the United States is not authorized to control.

10. CONTENTION BY THE GOVERNMENT THAT NO CONTROL IS EXERCISED BY THIS LEGISLATION.

The Government contends that "no power of control over or regulation of agriculture has been asserted, but that, to the contrary, steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money". (Government Brief, p. 264.)

It bases this statement—*first*: on the contention that the compliance with the scheme of production is purely voluntary; and *second*: on the ground that the legislation contemplates that the Secretary would do no acts which are not legal under the laws of the several states.

We have sufficiently answered above the contention that the carrying out of the plan by granting benefits to those who comply and refusing benefits to those who refuse to comply, is not an exercise of control.

The contention that the Secretary of Agriculture is only authorized to carry out the scheme in States where

such a scheme would be lawful if subject to the laws of the States, in other words, where such a scheme would be lawful if carried out by an individual, is immaterial if correct, but it is not correct. An attempt to control matters beyond the jurisdiction of the United States is unconstitutional, not only where it is contrary to the laws of the various States, but also merely because it is the exercise of a control, which control has not been granted to the United States, and for this reason it is beyond the power of the United States, and therefore unconstitutional.

Furthermore, the contention that the Secretary of Agriculture was to put his plan into effect only in those states where the law permitted such a scheme is wholly inconsistent with the legislation. It is clear that the scheme approved by the legislation could not be made effective or carried out unless applied generally—the Secretary would defeat the purposes of the Act if he only reduced production in some states and left it unrestrained in others. The Act would obviously not have been passed unless it could be applied everywhere.

The major policy of the Act (Section 2) is to establish and maintain a balance "between production and consumption of agricultural commodities, and such marketing conditions therefor as will re-establish prices to farmers." The justification for the legislation is stated in the Declaration of Emergency which sets forth that the prevailing prices of agricultural commodities have destroyed the purchasing power of the farmers for industrial products, impaired agricultural assets supporting the national credit structure and affected transactions in agricultural commodities with a national public interest, and obstructed the normal currents of commerce in such commodities. The Secretary is given authority by Section 8, sub-section (1), to provide for the limita-

tion of production for the express purpose of effectuating the policy of the Act. He is given further power, with the approval of the President, "to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title." It is quite clear that the Act contemplates its being carried out under the powers claimed by the United States, and regardless of State laws, and that it could not otherwise accomplish its objects. The administration of the law has coincided with this view. The Secretary has proceeded to put the plan into effect, regardless of the laws of the States under which such a combination to limit production is unlawful.

XIV.

CONTENTION THAT CONGRESS HAS POWER TO REGULATE AGRICULTURE TO CARRY OUT THE FISCAL POLICIES OF THE UNITED STATES.

The Constitution confers power to borrow money, levy taxes, coin money and regulate the value thereof, which powers considered together the Government refers to as the fiscal powers of the United States. The United States, of course, also has implied power to collect the taxes and other receipts of the Government and to disburse them for various governmental purposes.

Under these powers the National Banks, the Federal Reserve Bank, and the Federal Land Banks and Joint Stock Land Banks have been authorized. The latter are authorized to make agricultural loans. The plight of the farmer is such today that the Government contends these banks have found difficulty in collecting their loans, that they have many frozen assets and cannot turn over their assets rapidly, so that credit is contracted.

Having created these banks with the power to make agricultural loans, it contends that Congress has power to preserve them.

The argument then proceeds that by restricting and regulating agriculture, as provided for in the present legislation, farm property will increase in value, farmers will be able to pay their mortgages; this will benefit the banks set up by the Government and make them more effective, enabling them to sell their bonds so as to increase their assets and thus supply additional credit, and carry out their policies more effectively. The Government has also invested money through the Recon-

struction Finance Corporation in twelve regional agricultural credit corporations. The Government says,

> "Only by increasing the purchasing power of the farmer could the large investments which the federal government has made in this field ever be liquidated and the stability of the financial system be restored."

The trouble with the Government's contention is that it proves too much.

The United States in *M'Culloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank,* 9 Wheat. 738, was held entitled to establish banks. It was admitted that the Constitution granted no express power to form such corporations but it was held that the organization of such banks was permissible because it was an appropriate means to carry out the Government's fiscal policies.

The Government collects in taxes each year large sums of money in the various parts of the country; it must keep, transport, and disburse these sums, and engage in other similar financial operations. It, of course, must have power to conduct these operations. It could conduct them itself, if it saw fit to do so, through its own employees. It was held that to conduct them through banks was a reasonable, appropriate method, and for this reason the Government was authorized to create banking corporations for the purpose.

Having decided to create a corporation or corporations for the purpose, in order that such banks might be efficient and economical, it was held that they might be authorized to engage in the general banking business in the same manner as other banking corporations which the United States might use for the purpose of aiding in its financial operations.

In *M'Culloch* v. *Maryland, supra,* Chief Justice Marshall, in speaking of the fiscal operations which the Government had to conduct, for which a bank was an appropriate means, said,

> "Throughout this vast republic from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" (p. 408).

In *Osborn* v. *Bank, supra,* Mr. Justice Johnson, in referring to the fiscal policies of the bank, said:

> ". . . it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury;" (p. 872).

It was these fiscal operations, absolutely essential to government operations, which the court held in these cases justified the creation of banks.

Authority to create the Federal Land Banks and the Joint Stock Land Banks was based on the same premises. The court in *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, sustaining their validity, said,

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them

> within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions."

In other words, Congress is authorized to create banks as agencies through whom it may conduct its fiscal operations and, in order that such banks may be efficient, it may give them the additional powers normally exercised by banks. In the same way, if Congress should construct an interstate railroad it would have authority, in order that the railroad might operate economically and reasonably, to permit it to conduct the ordinary intrastate business which an interstate railroad normally conducts.

The contention that the Government now makes is that because Congress is authorized to create banks as an appropriate means to conduct the Government's fiscal operations and authorize such banks to conduct normal banking business, it may, in order that such banks may be successful, regulate and control any industry in which they may invest their money. Because the banks and other governmental agencies hold about eighteen per cent of the total farm mortgage debt, Congress, it is contended, may regulate the entire agricultural industry. The Government does not limit itself to provisions respecting the collection or liquidation of the particular mortgages which these banks may hold, but contends it is authorized to regulate all agriculture.

If this principle is sound, the Government, having constructed a railroad under its interstate commerce authority, could, in order to make such railroad successful and give it enough business to support it, regulate all intrastate industry which might furnish it with business. Or, having created the national banks which lend money to practically every industry in the country, it can, in order to protect such banks, regulate intrastate industry of every character.

We submit the contention does not justify further discussion.

XV.

THE PROCESSING TAXES VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE FIFTH AMENDMENT.

Under the Fifth Amendment, no person can be deprived of property without due process of law. This provision is applicable to the taxing power.

It is not due process of law to take, without compensation, the property of one person or a class of persons by taxation or otherwise in order merely to hand it over to another person or class of persons.

In the case of a tax raised for a particular purpose, as in the present case, the purpose for which it is to be applied, must be a public purpose.

In *Jones* v. *City of Portland,* 245 U. S. 217, 221, the court said,

> "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State."

See also *South Carolina* v. *U. S.,* 199 U. S. 437, 451.

The ground on which taxation is justified is that every person is liable to contribute to the public treasury, funds to be put to public use. The right to tax the individual is based on his obligation to contribute to such public purposes, including the maintenance of the Government, and the consideration he receives is his interest in the maintenance of the Government and the public services so furnished by or through the Government. If taxes are levied on him for a private use, he is under no obligation to contribute and he cannot be deemed to have re-

ceived a benefit and his property is arbitrarily taken without compensation.

Is the present purpose a public purpose?

To determine this, we must ascertain why and for what purpose the payments provided for in the present legislation are made to cotton growers. This question, we have fully considered above (*supra,* pp. 21-6). The payments are made to cotton growers to enable them to receive a "fair share in the national income". This is to be accomplished by direct cash payments to those who agree to restrict their production. The payments add to the cotton growers' income and the restriction enables them to get higher prices for the restricted production. The objective is to give cotton growers the same relative purchasing power or share of the national income for their products which they had in the period 1909 to 1914.

It is contended that if farmers receive this increased share of the national income they will purchase more manufactured or other goods and thus indirectly increase general prosperity. The following points are to be noted:

1. The payments are not made to farmers as objects of charity. Recipients of benefits are not selected on the ground of their poverty. The richest man in the country, if a cotton grower, is requested and is entitled to join in the plan and receive benefits.

2. The cotton growers are not paid to perform or provide any direct service to the public. They are not asked to produce more products required by the public; on the contrary, they are required to produce less. They are not asked to do a single thing which can in any conceivable way be regarded as a direct service to the public; on the contrary, they are given a cash benefit in order that they may do less work so as to enable them to charge the public more for what they do produce.

In other words, the cotton growers are paid to do something which is for their own interests and involves no sacrifice on their part or any direct service to the public. On the contrary, the direct immediate effect is a decrease of supply, and an increase in prices—a detriment to the public.

3. The purpose of the plan is to give "a fair share of the national income to the cotton growers" (*supra*, p. 26), but the money used for this purpose is not taken from the incomes of those who have more than the farmers and given to the farmers so that they will have more nearly an equivalent income. There might be some social justice, if not constitutional authority, if incomes in excess of a certain amount were taken from one class and given to another class having smaller incomes in order to equalize them.

But, in the present case, the tax is not an income tax or a tax on income in excess of a certain amount. The taxes are imposed on cotton manufacturers no matter how much money they may be losing. The plan does not propose to equalize incomes, but to take money or property from the cotton manufacturers whether or not they have any incomes and pay it over to the farmers in order that the farmers may have an income.

It is a well known fact that for a decade the cotton textile industry on the whole has been losing rather than making money. The situation became so disastrous that the President on March 26, 1935 appointed a committee composed of cabinet members to investigate conditions in the industry. Their report was submitted by the President to Congress on August 21, 1935 (*Cotton Textile Industry, 74th Congress, 1st Session, Document No. 126*). This report shows the unfortunate conditions in the textile industry. One can not read it without con-

viction that this industry needs help as much as the cotton growers. To illustrate the report shows that in the period July 1 to December 31, 1934 out of 457 cotton mills comprising the principal cotton textile mills in the country, 300 sustained losses and only 157 made profits. (Report, p. 61.) During this period the cotton manufacturers became liable for over $50,000,000 in processing taxes necessarily paid for the most part out of capital and used for the purpose of giving the farmers a "fair share of the national income" or profits.

But this is not all. The cotton growers, receiving these taxes so paid out of the capital of the cotton mills, have agreed to reduce the cotton available for sale so as to increase the cost of this product which the mills must purchase. The plan is to increase the cost by at least six cents a pound, or over $150,000,000 a year for the cotton domestically consumed. Thus, so far as the plan is successful, the cost to the cotton textile industry will be over $150,000,000 a year for increased cost of cotton and over $100,000,000 a year in processing taxes, a total of over $350,000,000 a year. The total value of product of the cotton textile industry in 1933 was $861,170,352. (*cf.* note p. 5.) These additional taxes must be paid regardless of whether the mills make any profits.

It is, of course, contended that the mills will pass the tax on to their customers. Of course, they will, to the extent that they can do so, but to what extent they can is another question. The tax is a direct tax on the manufacturers, payable by them whether or not they make any profits and whether or not they are able to include all or any part of the tax in their prices to the public. Furthermore, to the extent the tax can be passed on to the public, it is passed on to every class in the community and not merely to those who have an income equal to the farmers.

All classes of persons necessarily buy cotton goods, including the very poor.

4. The contention that the increased purchasing power thus given the farmers will enable them to purchase more manufactured goods and thus increase general prosperity merely means this: By taking property from Class A and giving it to Class B, Class B will have more purchasing power and will therefore spend more money and thus indirectly add to the general prosperity. This is merely distribution of wealth by governmental decree.

The fact stated above—that the cotton manufacturers are required to pay these immense sums, whether or not they make any profits, to the farmers for the purpose of giving the latter "a fair share of the national income"—is a simple fact. Whether the economic theory that this will increase general prosperity is sound is another question which is not, perhaps, material. We have discussed it in the note at pages 27-29, *supra*.

Can a reduction of production increase national income; if not, how can the reduction of production provided for by this legislation aid the public generally? How can a price be determined which will give the farmers the same relative purchasing power for their products as before the war, since the cost and labor involved in producing agricultural commodities and the character and cost of most articles farmers buy has radically changed? Why is the relative pre-war purchasing power which farmers had, even if it could be determined, a fair basis for division of the national income today? These are some of the questions discussed above.

In any event, we do not deem them material. Whether or not general prosperity is aided by such transfer of

purchasing power, it is clear that it is an indirect result only and that it is sought to be accomplished by a transfer of property from the manufacturers, regardless of the amount of income they have, to the farmers who are not required to render any direct service to the public in exchange, the only service rendered being the agreement to restrict production, the direct result of which is to aid the farmers by increasing their prices and consequently to increase the cost of farm products to the public.

We respectfully submit that a transfer of property from one class to another for such purposes is clearly not for public purposes, as recognized by the law.

In *Allen* v. *Smith*, 173 U. S. 389, the bounty for sugar which was sustained in *United States* v. *Realty Co.*, 163 U. S. 427, as the recognition of a moral obligation to those who had planted their crop the previous year on the faith of the bounty law then in existence, whether or not such law was legal, was under consideration. The question was whether the payment should go to the manufacturer of the sugar or to the grower of the cane. The court held that the bounty was intended for the manufacturer of the sugar in consideration of his manufacturing it. Otherwise, the court held it would be a mere donation. The court said,

> "This disassociates the bounty altogether from the motive which actuated Congress in granting it, and turns it into a mere donation of so much money, which it can not be presumed to have made, even if it had the power. Bounties granted by the government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or

moral obligations to be recognized. To grant a bounty irrespective altogether of these considerations, would be an act of pure agrarianism;" (p. 402).

In the present case, we have no direct service to be rendered to the public but action only, which it is admitted, is for the farmers' own interest. Benefit payments are, therefore, a pure gratuity.

In *Loan Association* v. *Topeka,* 20 Wall. 655, it was held that bonds issued by a municipality to induce a bridge company to locate in the municipality were illegal since the money must be raised by taxation and the purpose would not be a public purpose. The court said,

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. . . . 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'

". . . If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pur-

> suit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town'' (pp. 663, 664, 665).

In this case, the recipient did give consideration by the operation of a factory in the municipality which presumably otherwise would not have been operated, and he did furnish bridges to the public, employment to the inhabitants of the municipality, and maintained property which the municipality could tax. In the present case, the farmer is restricting the products he offers to the public, taking taxable land out of cultivation, and throwing farm laborers out of employment.

In *Parkersburg* v. *Brown,* 106 U. S. 487, the City of Parkersburg was authorized to issue bonds for the purpose of lending the proceeds to persons engaged in manufacture, the money to be repaid. This was held unconstitutional since the money to pay the bonds might have to be raised by taxation. The court said,

> ''Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person'' (p. 501).

In this case, as in the *Topeka* case, the manufacturer was to furnish a consideration by maintaining a manufacturing plant.

In *Cole* v. *La Grange,* 113 U. S. 1, the Constitution of Missouri authorized the issue of municipal bonds to aid manufacturers. The court said,

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject" (p. 6).

The court pointed out that aid given public utilities such as railroads and grist mills has been sustained on the same ground that the right of eminent domain has been justified, namely, that these furnish an essential or necessary public service and are, therefore, to be distinguished from cases of aid to private business which is not ordinarily a matter of public necessity. It is to be noted, however, that in both cases some consideration or service was rendered which differentiates both from the present case.

The principle has been sustained in many cases in the State courts. In the leading case of *Lowell* v. *Boston,* 111 Mass. 454, the City of Boston was authorized to issue bonds to raise funds to render aid by way of loans in rebuilding a portion of the city burned in the great fire of 1872. The court held that taxes to be raised for this purpose would not be raised for a public purpose. The court points out clearly that a purpose to be public must furnish some direct public service to the community and that the indirect benefits which might ensue from a private business furnishing employment and otherwise aid-

ing in producing prosperity can not turn what is a direct private purpose into a public purpose. The court said,

> "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. **It is the essential character of the direct object of the expenditure which must determine its validity,** as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> "The principle of this distinction is fundamental. It underlies all government that is based upon reason rather that upon force. . . .
>
> "an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community,

> to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. . . . But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation'' (pp. 461, 462, 463).

In certain other cases the right of a State to raise taxes in order itself to engage in business which has usually been considered of a private or semi-private character has been contested. Quite a different principle is here involved. The State in such case furnishes a direct service to the public. The question is whether the State may furnish this character of service, which is ordinarily furnished by private individuals, and which doubtless would be so furnished if the State did not provide therefor. The question is quite different from cases of furnishing money to private individuals for businesses of a private character so that they may make a profit even though in consideration thereof they also furnish a service.

In *Jones* v. *City of Portland,* 245 U. S. 217, it was held that the City of Portland could engage in the business of selling coal to the inhabitants at cost. The court stated its reluctance to interfere with the right of a State to determine what was a public purpose. It stated that States and municipalities could furnish light and water and also natural gas for heating purposes, which were recognized as public purposes and that, therefore, it saw no reason why the municipality should not also furnish heat in a different form by such means as were necessary, heat being as indispensable to the health and comfort of the people as light or water. Here a direct service to the public was rendered by the municipality.

In *Green* v. *Frazier*, 253 U. S. 233, the same principle was applied to the legislation of the State of North Dakota providing that the State, through corporations organized for the purpose, might engage in banking, manufacture and marketing of farm products and furnishing grain elevators and home building operations. It was shown that ninety per cent of the wealth of the State was produced from agriculture and that a large proportion of the people were tenants moving from place to place for whom it was desirable to furnish homes.

The court reiterated its reluctance to interfere with what the Constitution and laws of the State deemed a public purpose and held this legislation did not violate due process. It pointed out that the State was furnishing a direct service to the public:

> "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Loan Association* v. *Topeka*, 20 Wall. 655-665" (p. 242).

The court also laid stress on the peculiar conditions existing in North Dakota, emphasized in the opinion of its highest court. Here, of course, we again have a direct service furnished to the public by the State itself and the benefit to the public is not the indirect result of a business conducted by private individuals.

In the recent Railroad Pension Case (*Railroad Retirement Board* v. *Alton R. Co.*, 55 Sup. Ct. Rep. 758), one of the objections to the act was that the railroads were treated as a single employer so that pensions from employees of one railroad might be paid out of funds furnished by another. In that case it could also be contended that it was a public benefit that retired railroad employees should have pensions as this would result in their spending money which would aid a more general

prosperity, just as in the present case. The court, however, said,

> "There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees" (p. 765).

We respectfully submit that while the application of the principle involved in these various cases is not precisely defined in all cases, the following limitation appears clearly established.

When money is raised by taxes to be paid to private individuals, it is not a public purpose unless they render some direct service or benefit to the public in return. An indirect benefit which results merely from the fact that the recipients by reason of the payments to them are more prosperous and therefore by spending more money tend to make the community more prosperous is not sufficient to make the payments a public purpose.

The purpose of this legislation—to take property from cotton manufacturers, and pay it to farmers in order to give the farmers what Congress deems a fair share of the national income—is not a public purpose or due process. It is aggravated in the present case by the fact that the money is not taken from the income of the cotton manufacturers for the purpose of equalizing income but is taken from them regardless of whether they have any income in order to provide an income for the farmers.

XVI.

SINCE THE PLAN FOR RESTRICTING AGRICULTURE PROVIDED FOR IN THIS LEGISLATION IS UNLAWFUL AND SINCE THE PURPOSE IS NOT A PUBLIC PURPOSE, THE TAXES IMPOSED TO CARRY IT OUT ARE UNLAWFUL.

The plan for restricting the production of cotton, as we have shown above, is unlawful and the benefit payments are made for the express purpose of carrying out this unlawful scheme and, further, are not for a public purpose. Since the taxes are levied solely for the purpose of paying the benefits and thus for the direct purpose of carrying out this unlawful plan, they are necessarily unlawful.

An illegal or unconstitutional tax can not be collected, whether the tax is illegal because levied on an object which it is not within the power of Congress to tax or is for an unlawful purpose.

That the taxes are levied for the sole and direct purpose of carrying out the unlawful plan is undoubted. They go into effect when, and only when, the Secretary of Agriculture determines that the benefit payments are to be made; the Act provides that they shall cease when the benefit payments terminate; they are appropriated for the purpose of paying these benefits which are the heart of the plan and are made solely for the purpose of carrying out the plan.*

*NOTE. "Estimated collections and expenditures covering commodity programs in effect or in process of approval for marketing periods indicated" (*Report*, p. 278, table 34). Cotton, Aug. 1, 1933—July 31, 1935; Collections: Processing tax, $237,000,000; Compensating tax, $22,000,000, total, $259,000,000. Expenditures, rental and benefit, $242,236,000; Removal of Surplus, (nothing); Balance, $16,764,000; less administrative expenses chargeable to commodity program, $10,527,757; balance, $6,236,243.

Since the right of the United States to levy taxes is, as we have shown above, a limited right—the right to levy taxes only for specified purposes—and as the carrying out of this unlawful scheme is not included within these purposes, and further since it is not a public purpose, it necessarily follows that the taxes are unlawful.

The cases of *Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon,* decided in one opinion (262 U. S. 447), have no application, as the Government urges, to the present case.

The suit brought by Frothingham did not involve the question of whether an illegal tax could be collected. It involved only the question of whether officers of the United States Government could be enjoined from disbursing moneys from the treasury which had been appropriated by Congress for purposes alleged to be unconstitutional, on the ground that such payments might thereafter affect the plaintiff if, on account of such payment, it thereafter became necessary to assess taxes and taxes were assessed which, because of their nature, might affect Frothingham as a taxpayer.

In the *Mellon* case, the State of Massachusetts and a citizen of the United States brought suits to enjoin the Secretary of the Treasury and other Government officers from carrying out the Shepard-Towner Maternity Act which provided for payments by the United States to such states as undertook, in accordance with the terms of the Act, to cooperate with the United States in reducing maternal and infant mortality.

The court held that the State's right over the subject matter was not invaded since payment would and could be made to the State only with its express consent. To the argument that it was an attempt to induce the State to give up part of its sovereign rights, it was answered

that this question as between the United States and a State was a political question and not a judicial one, and that it therefore could not be decided by the court.

The court held that the individual taxpayer had no standing. The taxpayer's contention was that if the money was appropriated she might be called upon in the future to pay taxes which would not have been assessed on her if these moneys had not been so appropriated.

The court said of the taxpayer:

> "His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity. . . .
>
> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In other words, it was not shown that the plaintiff was suffering any immediate damage nor was it certain that she would suffer any damage in the future, and the possibility that she would suffer any damage in the future was merely shared with all members of the public and she showed no specific or special damage to herself.

Of course, the present case is quite different. Here the Hoosac Mills is called on to pay immediately over $80,000, which we submit is illegally assessed. It is not an indeterminate question of whether it may or may not be damaged in the future by the payment of these unlawful benefits from the Treasury, nor is the taxpayer

damaged merely as all members of the public are or may be damaged. The damage is immediate, direct, and certain and the public generally is not suffering this damage, but only the Hoosac Mills and a few other cotton textile manufacturers. The *Mellon* case clearly has no application.

Respectfully Submitted,

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